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THE UNITED STATES NATIONAL PARK SYSTEM: OVERVIEW, CHALLENGES AND POLICY RECOMMENDATIONS FOR CHINA

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ABSTRACT

This article conducts a comparative analysis of national park legislation, focusing on insights from the US National Park System to inform the development of China's emerging national park framework. Against the backdrop of a global conservation movement, the US system serves as a valuable model for China, which initiated its own national park system in 2017. On October 12, 2021, China has formally established its inaugural set of national parks, comprising the Three-River-Source National Park, the Giant Panda National Park, the Northeast China Tiger and Leopard National Park, the Hainan Tropical Forests National Park, and the Wuyishan National Park. Encompassing approximately 230,000 square kilometres, these five national parks safeguard nearly 30% of China's crucial terrestrial wildlife species. As China endeavours to enact comprehensive legislation for its national parks, this research aims to contribute to the ongoing efforts by addressing key questions such as the efficacy of the US's "One National Park, One Law" model, the governance dynamics between federal, state, and local entities, and strategies for balancing conservation with diverse land uses. The analysis spans five sections, exploring the historical evolution of the US National Park System, its legal framework, challenges faced by US national parks, and policy recommendations for China. The US experience highlights the importance of establishing clear legal authorities, fostering robust public participation mechanisms, and harmonizing relationships with Indigenous communities. The findings presented in this study aspire to facilitate a nuanced understanding of national park legislation, promoting international collaboration between the US and China for the sustainable management of natural lands and the protection of global biodiversity.

Keywords: National Park System; Protected Areas; Indigenous People; Stewardship

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**The United States National Park System:
Overview, Challenges and Policy Recommendations for China**

1. INTRODUCTION

It is generally acknowledged that the United States' national park system has inspired a worldwide conservation movement of designating and protecting landscape ecosystems in their natural state for public access and future generations.[1] There are now more than 269,673 national parks and other protected areas in more than 245 countries and territories according to the March 2022 release of the World Database on Protected Areas.[2] In 2017, the Chinese central authority decided to establish a national park system in China.[3] Since then, 11 pilot national parks have been established in 12 provinces across China. These parks cover an area of more than 200,000 square kilometres. They protect not only China's landmark natural culture and natural heritage, but also some of China's most important flagship species, such as the Giant panda (*Ailuropoda melanoleuca*), the Siberian tiger (*Panthera tigris* ssp. *altaica*), the Asian elephant (*Elephas maximus*) as well as the Snow leopard (*Panthera uncia*). On October 14, 2021, Chinese government formally established the first batch of five national park, which are the Three-River-Source National Park in Qinghai province and the Tibet autonomous region, the Wuyishan National Park in the provinces of Fujian and Jiangxi, the Giant Panda National Park in Sichuan, Shaanxi, and Gansu provinces, the Northeast China Tiger and Leopard National Park in Jilin and Heilongjiang provinces, and the Hainan Tropical Rainforest National Park in Hainan province. The national park system in China is still in its nascent stage. As part of its national strategy of promoting ecological civilization and sustainable development, the Chinese government is keen to complete the development of the national park system and to enact legislation and regulations to fully implement it. The National Park Management Bureau under the National Forestry and Grassland Administration within the Ministry of Natural Resources is leading the effort to develop the national legislation. The National People's Congress has also listed a national law on national parks in its 14th Five-Year legislative plan. The national law would most likely define the function, conservation targets, designation criteria, management principles, and governance structure of the national parks. In order to inform the National Parks legislation in China, many Chinese legislator and scholars called for in-depth study of national park legislations in other countries to learn from their experiences.[4] To contribute to the effort in developing new legal framework for China's National Park System, we conducted law and policy research on the US National Park System. We also hope the research

[1] *See* National Park Service, U.S. Dept. of the Interior, Management Policies, (2006) 8 (stating that national parks are "an American invention of historic consequence, marking the beginning of a worldwide movement that has subsequently spread to more than 100 counties").

[2] <https://www.protectedplanet.net/en/resources/march-2022-update-of-the-wdpa-and-wd-oecm>, accessed 21 December 2023.

[3] Party's Central Committee and the State Council adopted a general plan to establish a national park system in China.

[4] Qin Tianbao, "Several Dimensions on National Parks Legislation in China", (2020) 46 (1) Environmental Protection 43.

results will inform other countries' efforts in developing national park legislations.

The goals of this research paper are twofold: first is to provide an overview of the legal framework of US National Park System with detail references to sources of laws, regulations and policies; second is to analyze the specific legal and management issues in particular interested to Chinese legislators and national parks' managers. Below are the research questions Chinese scholars highlighted:

i. How does the "One National Park, One Law" model work in the US? How are laws or regulations implemented in each national park law? Are there conflicts among different laws related to national park management? If yes, how are conflicts resolved?
ii. The governance system of the US national parks (what are the policy and legal relationships between the federal government, the state, and the parks, the Indigenous inhabitants and the surrounding residents?
iii. How do you achieve the coordination of conservation and development in national parks? How do you manage conflicts with other resource uses such as forestry, oil and gas, tourism, dogs, bicycles, helicopters chainsaws, etc.? How do you manage historical uses within and adjacent to national parks such as mining rights and hydropower stations? If these uses are being phased out, how do you "exit" them legally, timely and effectively?

Section II of this paper introduces brief history of the founding of national park system in the US and the federal public land system that the national park system embedded in. Section III reviews the legal framework and legal authorities of the US national park system and its conservation v. enjoyment dual mandate. Section IV examines and analyses the key issues raised by Chinese partners and current major management and regulatory challenges facing the US park system. Section V shared some policy recommendations on how China's pending national park legislation can learn from US experiences. This paper concludes that with more exchanges between US and China, scholars, practitioners, legislators and managers of national park system will benefit from learning from each other to enable better management and conservation of our unique natural lands through rule of law.

2. STEWARDSHIP OF FEDERAL PUBLIC LANDS: HISTORY AND BACKGROUND OF NATIONAL PARKS IN THE US

2.1 A Brief History of the Founding of US National Park System

In the late 19th century, the United States stopped the wholesale effort to sell off all federal lands and started setting aside federally protected lands for specific purposes. At first, the system was disorganized with many competing agencies and departments, especially with regard to the national parks. So, in 1916, Congress enacted the Organic Act, creating the

National Park Service and condensing certain federally protected areas under their authority.

2.1.1 From Yellowstone National Park to the National Park Service

An 1870 expedition into Yellowstone birthed the idea of national parks.[5] After seeing all of the wonders this land had to behold, the expedition group sat around a campfire discussing how to split up the land for individual profit.[6] One man, Cornelius Hedges, had another idea; he proposed that the land be set aside as a reserve for the use and enjoyment of all people for all time.[7] The expedition resulted in the Yellowstone Park Act that was signed by President Ulysses Grant on March 1, 1872.[8]

The Act set apart the area of land "lying near the headwaters of the Yellowstone River as a public park."[9] The first section of the Act described the boundaries of the land to be preserved, withdrew them from "settlement, occupancy, or sale," and set it apart "as a public park or pleasuring-ground for the benefit and enjoyment of the people."[10] Finally, section one said that anyone occupying the land, unless otherwise provided shall be a trespasser.[11] Section two gave control of the park to the Secretary of the Interior, and provided that the Secretary shall make and publish rules and regulations for the park.

It was not until the 1890s that other national parks were set aside for protection.[12] Problems began to arise in the parks' administration as more and more lands were set aside for the public under acts of Congress and acts of the President.[13] Up until 1915, individual parks were managed by different Departments: the Secretary of the Interior managed some; the Secretary of War managed others; and the Secretary of Agriculture managed yet others.[14] These different departments began to see the need for integrated administration to promote proper planning, development, protection, and conservation of the lands in the public interest.[15] So, in 1916, President Wilson signed the Organic Act, which created the National Park Service (NPS) within the Department of Interior.[16] The term "organic"

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5 James F. Kieley (ed.), "U.S. Dept. of Interior, A Brief History of the National Park Service", (1940) <https://www.nps.gov/parkhistory/online_books/kieley/index.htm>, accessed on 21 July 2023.

6 *Ibid* (the web edition of this book notes that the campfire story has been proven untrue).

7 *Ibid.*

8 *Ibid.*; *See* Yellowstone Park Act, <https://www.nps.gov/yell/learn/management/yellowstoneprotectionact1872.htm>; <https://catalog.archives.gov/id/596351>, accessed 18 December 2023.

9 Yellowstone National Park Protection Act (1872), NPS, <https://www.nps.gov/yell/learn/management/yellowstoneprotectionact1872.htm> (last updated July 13, 2018).

10 *Ibid.*

11 *Ibid.*

12 A Brief History of The National Park Service, *supra* note XX.

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

16 *Ibid; see* also *Organic Act of 1916*, NPS, <https://www.nps.gov/grba/learn/management/organic-act-of-1916.htm> (Last updated April 22, 2021, accessed on December 18, 2023).

meant to indicate that this was the formational legislation for what has become the national park system. The NPS was, at that time, responsible for 35 national parks and monuments.[17] The Service's mission, as specified in the Act, is to "promote and regulate the use of the Federal areas known as national parks, monuments and reservations…by such means and measures as conform to the fundamental purpose of the said parks, monuments and reservations, which *purpose is to conserve* the scenery and the natural and historic objects and the wildlife therein *and to provide for the enjoyment* of the same in such manner and *by such means as will leave them unimpaired* for the enjoyment of future generations."[18]

2.1.2 NPS and the National Wilderness Preservation System

In 1933, the President, through Executive Order 6166, transferred 56 more national monuments and military sites to the NPS.[19] Additional parks have continued to be added to the national park system, and the land governed by NPS has grown considerably since its founding. However, Congress made another major change around the NPS's 50th anniversary; Congress signed the Wilderness Act requiring review of parks and other protected areas, such as national forests, of 5,000 acres or larger with no roads running through them to be reported for possible wilderness designation "'where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.'"[20] Since the Bill's passage in 1964, Congress has designated over 111 million acres as part of the National Wilderness Preservation System, of which 44 million acres are in national parks. Four federal agencies manage this land with the NPS managing the most, about 40%.[21]

That same year, Congress passed the Land and Water Conservation Act with the purpose of raising funds through entrance and user fees, property sales, and taxes to acquire more land for protection.[22] This law has ultimately benefited public lands with over $7.2 billion in investment for the planning, acquisition, and development of outdoor recreation resources, with another $4.5 billion for the NPS to buy privately owned land for protection.[23]

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17 *Quick History of the National Park Service*, NPS, <https://home.nps.gov/articles/quick-nps-history.htm> (last updated May 14, 2018, accessed on December 18, 2023).

18 *Organic Act of 1916*, NPS, <https://www.nps.gov/grba/learn/management/organic-act-of-1916.htm> accessed on 22 April 2023 (emphasis added).

19 *Quick History of the National Park Service*, NPS, <https://home.nps.gov/articles/quick-nps-history.htm> (last updated May 14, 2018); *see also* <https://www.nps.gov/parkhistory/online_books/anps/anps_3b.htm>, accessed on 21 November 2023.

20 Donald J. Hellmann, *The National Park Service at 100*, (2016) 5 (25) Akron L. Rev. 50 (quoting Wilderness Act, Pub. L. No. 88-577, 78 Stat. 891 (1964), <https://uscode.house.gov/statutes/pl/88/577.pdf>; *Fast Facts*, Wilderness Connect, <https://wilderness.net/learn-about-wilderness/fast-facts/default.php>, accessed 19 October 2023.

21 *Agencies*, Wilderness Connect, <https://wilderness.net/learn-about-wilderness/agencies.php>, accessed on 19 October 2023.

22 Hellmann, *supra* note 20, at 27.

23 *Ibid*. at 28.

2.2 Federally Protected Lands and Their Differences

In total, as it is shown in Figure 1 below, the federal government owns about 640 million acres of land in the US: about 28% of the total land area in the US.[24] The vast majority of this land is managed by four agencies: the Bureau of Land Management (244.4 million acres), the Forest Service (192.9 million acres), the Fish and Wildlife Service (89.2 million acres), and the National Park Service (79.9 million acres).[25] Each of these agencies manages some protected areas within their boundaries. But only the NPS is specifically tasked with protecting all their lands and providing for their enjoyment by the public.[26] Each of these agencies and their differences will be briefly discussed below.

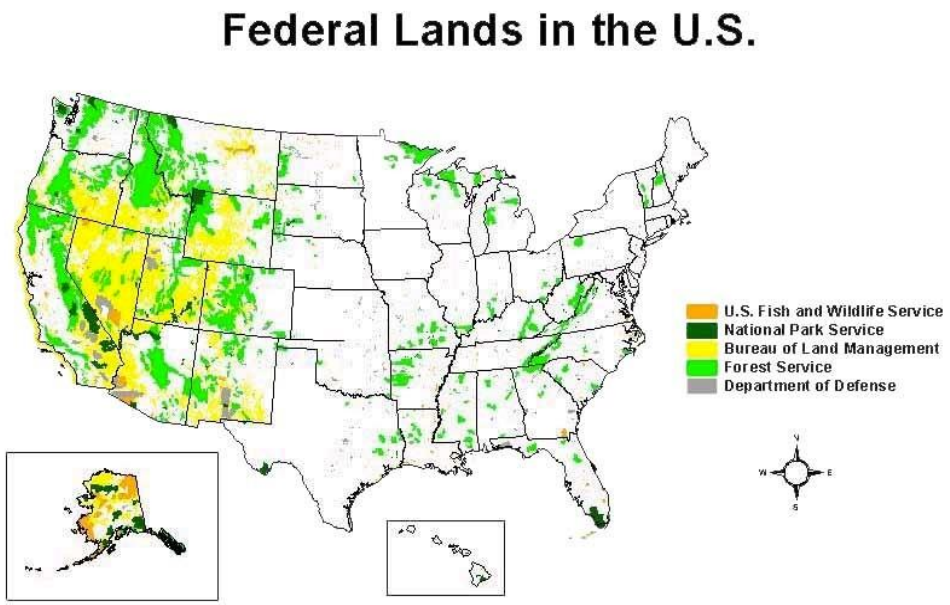

Figure 1: Federal Lands in the US

2.2.1 Other Federally Managed Public Lands

Besides the NPS, several other US agencies manage protected lands. The Forest Service under the Department of Agriculture manages national forests.[27] The Forest Service's mission "is to maintain and improve the health, diversity, and productivity of the nation's forests and grasslands to meet the needs of current and future generations."[28] The Forest Service manages 100 million acres more than the NPS does.[29] Unlike national parks, national forests are managed under a multiple use concept, meaning they

[24] Carol H. Vincent and Laura A. Hanson, "Federal Land Ownership: Overview and Data 1", (2020) Cong. Rsch. Serv., R42346.
[25] *Ibid.*
[26] *Ibid.* at 5–6.
[27] *Managing the Land*, U.S. Dept. of Agriculture Forest Service, <https://www.fs.usda.gov/managing-land>, accessed on 25 September 2023.
[28] *Forests and Grasslands*, U.S. Dept. of Agriculture Forest Service, <https://www.fs.usda.gov/managingland/national-forests-grasslands>, accessed on 25 September 2023.
[29] *Ibid.*

can be used, within limits, for lumber, grazing, mineral extraction, and recreation.[30]

The US Fish & Wildlife Service manages protected areas called "National Wildlife Refuges."[31] Their mission "is to administer a national network of lands and waters for the conservation, management and, where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans."[32] The main difference between these protected areas and other federally managed protected area is that the sole purpose of these areas is wildlife conservation; this purpose guides everything else inside of the area.[33]

The Bureau of Land Management (BLM) manages National Conservation Lands.[34] National Conservation Areas are a unit of the BLM's Lands.[35] These are similar to national parks in that Congress designates them, and they feature scientific, cultural, historical, or recreational features.[36] The BLM's mission is to manage these public lands for the benefit of current and future generations while respecting the ties that native and traditional communities have to the lands.[37] Other units included under BLM's management are certain national monuments, wildernesses, wild and scenic rivers, and others.[38]

2.2.2 Areas Managed Under the National Park Service

Each of the agencies mentioned above has different goals than the NPS. But the national park system includes more than just national parks –– there are other "units" within the system as well. In fact, today there are 423 unique units in the system,[39] with more added, or changed, time-by-time.[40,41] The NPS includes many types of units, including National Battlefields, National Historical Parks, National Lakeshores, National Memorials, National Monuments, National Parks, National Preserves, National Rivers, National Seashores and other ocean and coastal parks, and others. Other areas, like the "heritage areas" discussed above, are not

30 *America's Public Lands Explained*, U.S. Dept. of Interior (June 13, 2016), <https://www.doi.gov/blog/americaspublic-lands-explained>, accessed on 25 September 2023.
31 *Ibid.*
32 *About Us*, U.S. Fish & Wildlife Service, <https://www.fws.gov/refuges/about/>, accessed on 15 May 2023.
33 *Ibid.*
34 *National Conservation Lands*, Bureau of Land Management, <https://www.blm.gov/programs/nationalconservation-lands>, accessed on 25 September 2023.
35 *America's Public Lands Explained*, *supra* note 30.
36 *Ibid.*
37 *National Conservation Lands*, Bureau of Land Management, <https://www.blm.gov/programs/nationalconservation-lands>, accessed on 25 September 2023.
38 *Ibid.*
39 *National Park System*, NPS, <https://www.nps.gov/aboutus/national-park-system.htm>, accessed on 25 September 2023; See <https://www.nps.gov/carto/hfc/carto/media/NPSWallMap.pdf> for a map of the whole NPS system.
40 See *Recent Changes to the National Park System*, NPS, <https://www.nps.gov/aboutus/recent-changes.htm>, accessed on 21 January 2023.
41 *National Park System*, *supra* note 39. See also *Ocean and Costal Parks*, NPS, <https://www.nps.gov/subjects/oceans/ocean-and-coastal-parks.htm>, accessed on 21 January 2023.

necessarily managed by the NPS but affiliated in some way.[42] In recent years, Congress and the NPS have been trying to simplify the names and establish criteria for each naming convention to decrease confusion caused by all the different naming conventions.[43] Generally, "National Parks" have a variety of resources and are large enough to provide adequate protection of the resources.[44] A "National Monument" is usually smaller than a Park and is intended to preserve at least one significant natural, cultural, or historic feature.[45] Another key difference between a national park and monument is that Congress designates new parks whereas usually the President proclaims new national monuments.[46] Sometimes this can lead to subsequent Presidents undoing their predecessors work.[47] Further, National Monuments can be managed by any of the seven agencies tasked with protecting America's public lands.[48] "National Rivers" preserve free-flowing streams and their immediate environment.[49] Each unit is a little different, but their purposes remain the same: protection of the area and enjoyment by the public.

National Heritage Areas are not units of the NPS, but they deserve explanation. The first one was created in 1984 by a law signed by President Reagan. He said it was "'a new kind of national park' that combined heritage conservation, recreation and economic development."[50] But these areas are significantly different from other units of the NPS. Similar to a national park, a national heritage area is designated by Congress, but unlike units of the NPS, the NPS lays no claim to ownership of the land within the area.[51] There are also no land-use controls imposed by the NPS on the areas.[52] Instead, the NPS partners with coordinating organizations to provide them with technical assistance and to distribute federal funds to

42 *Ibid.*
43 *What's in a Name? Discover National Park System Designations*, NPS, <https://www.nps.gov/articles/npsdesignations.htm>, accessed on 27 September 2023.
44 *Ibid.*
45 *Ibid; see* also *America's Public Lands Explained*, U.S. Dept. of Interior (13 June 2016), <https://www.doi.gov/blog/americas-public-lands-explained>, accessed on 10 July 2023.
46 Robert Sterling Yard, The National Parks Portfolio, Parks vs Monuments (6th ed. Isabelle F. Story, ed. 1931), <https://www.nps.gov/parkhistory/online_books/portfolio/portfolio0b.htm>, accessed on 25 September 2023.
47 *See*, e.g., Joe Fox et al., *What Remains of Bears Ears*, Washington Post, 2 April 2019, <https://www.washingtonpost.com/graphics/2019/national/bears-ears/> (describing President Trump's decision to reduce Bears Ears National Monument by 85% eleven months after President Obama created it); See also Deepa Shivaram, *Biden restores protections for Bears Ears monument, 4 years after Trump downsized it*, NPR, <https://www.npr.org/2021/10/07/1044039889/bears-ears-monument-protection-restored-biden> (explaining President Biden's restoration of protection to Bears Ears National Monument), accessed on 22 September 2023.
48 *America's Public Lands Explained*, U.S. Dept. of Interior (13 June 2016) <https://www.doi.gov/blog/americaspublic-lands-explained>, accessed on 20 September 2023.
49 *Ibid.* (See *America's Public Lands Explained* for more information on the variety of names and their meanings.
50 Rob Hotakainen, 'Panel will take up 4 new heritage areas, 26 other park bills' E&E NEWS (4 October 2021).
51 *The National Heritage Areas Program*, NPS, https://www.nps.gov/orgs/1524/index.htm, accessed on 21 January 2023.
52 *Ibid.*

the organizations. These areas are "large lived-in landscapes," where "historic, cultural, and natural resources combine to form cohesive, nationally important landscapes."[53]

3. CONSERVATION THROUGH RULE OF LAW: NATIONAL PARK LAWS AND REGULATIONS

3.1 Legal Framework of the US National Park System

3.1.1 Governance Structure of the United States

The supreme law of the land, the United States Constitution, created three equal branches of government: the legislative branch, the judicial branch, and the executive branch. The legislative branch consists of the House of Representatives and the Senate, collectively known as Congress. They are the lawmakers, and are elected on 2- and 6-year cycles. The judicial branch consists of a Supreme Court, which is the highest court, and other lower federal courts – District Courts (trial courts) and Circuit Courts (appellate courts). This branch construes and applies the laws enacted by Congress. Finally, the executive branch consists of the President and his or her appointed Cabinet. Each Cabinet member heads one of 15 executive departments; all federal agencies are below these departments. US federal agencies exist to regulate the nation's industries and resources. Collectively, the executive branch executes the laws, defends the country, and is essentially the face of the nation.

This basic outline of the US federal government is crucial to understand the hierarchy of authority directing the National Park System. It is important to understand this structure because each branch could affect the NPS's management in different ways. Congress can create laws directing the NPS; the Judiciary can interpret those laws in ways that would change how the NPS operates; and finally, the Executive can issue orders directing federal agencies, and agencies themselves can promulgate regulations under the authority given them by Congress and the President.
All national park land in the US is federal land, either retained by the federal government or purchased or traded from private owners, thus it is subject only to federal law. Congress's authority to pass the Organic Act derives from the property clause in the Constitution: "Congress will have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[54]

Although the Constitution uses the word "dispose of," the Supreme Court paved the way for Congress to perpetually manage and protect federal land in several key decisions. First, in 1897, the Supreme Court recognized that the federal government has a "power over its own property analogous to the police power of the several states," otherwise "the public domain of the United States [would be] completely at the mercy of state

[53] *Community-Led Conservation and Development*, NPS, <https://www.nps.gov/subjects/heritageareas//index.htm>, accessed 21 January 2023.
[54] U.S. Const. art. IV, § 3, cl. 2 (emphasis added)

legislation."[55] Next, in 1911, the Court held that the United States could "prohibit absolutely or fix the terms on which its property may be used," and since it could withhold or reserve the land, it could do so indefinitely.[56] Thus, Congress had the power to protect its lands indefinitely. When Congress enacted the Organic Act in 1916, it expressly created the NPS, which guides its purpose and functions.[57] The Organic Act is the NPS's authoritative ceiling. And the Organic Act does not defer to state law, so the NPS is not usually constrained by that law.[58] However, other federal law applies to the NPS.

3.1.2 The Organic Act

The Organic Act placed the NPS within the Department of the Interior. The Department of Interior is a US federal executive department, which "protects and manages the nation's natural resources and cultural heritage," among other things. Section 100101 of the Organic Act appoints the Secretary of the Department of Interior (who is part of the President's Cabinet) to "promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units." So, technically, the Director of the NPS acts with the Secretary's authority in that the Secretary acts "through the Director of the National Park Service." The Director is "appointed by the President, by and with the advice and consent of the Senate," and is subordinate to the Secretary (Figure 2). Through this hierarchy, the Director of the NPS fulfils their role in several ways and through a range of authorities.

The Organic Act prescribes that the Director shall select two deputy directors. One deputy director manages the NPS's operations, while the other is responsible for management and administration. As of September 2019, this statutory relationship was supplemented with an additional deputy director who serves as the Director's manager for congressional and external relations.

The Director of the NPS is statutorily obligated to comply with the Organic Act and subsequent laws. Congress refined the Organic Act's mission through the General Authorities Act (GAA) passed in 1970, and once again in 1978 through an amendment to the GAA known as "the Redwood amendment." Although there have been several Acts dealing with the management of America's national parks, they all "define a single standard for the management of the national park system." The Directors create policies to manage the NPS. The bulk of these policies are condensed into a manual called the NPS Management Policies. This manual is the doctrine of the national park system; it "govern[s] what can and can't

[55] Camfield v. United States, 167 U.S. 518, 525–26 (1897). The police power is power that states have to legislate and regulate to protect the public health and safety, or to promote public convenience, the general prosperity, or welfare. See Sligh v. Kirkwood, 237 U.S. 52, 59 (1915); Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

[56] Light v. United States, 220 U.S. 523, 536 (1911).

[57] 54 U.S.C. § 100301.

[58] *See* New Mexico St. Game Comm'n v. Udall, 410 F.2d 1197 (10th Cir. 1969).

happen in national parks." Indeed, the principles underlying the parks' management policies reflect that the policies must: comply with current laws; prevent impairment of park resources; amplify conservation; maintain NPS authority in decision making; emphasize consultation and cooperation with local and tribal authorities; pursue best business practices; encourage consistency for "one national park system"; and reflect NPS goals, among other things.

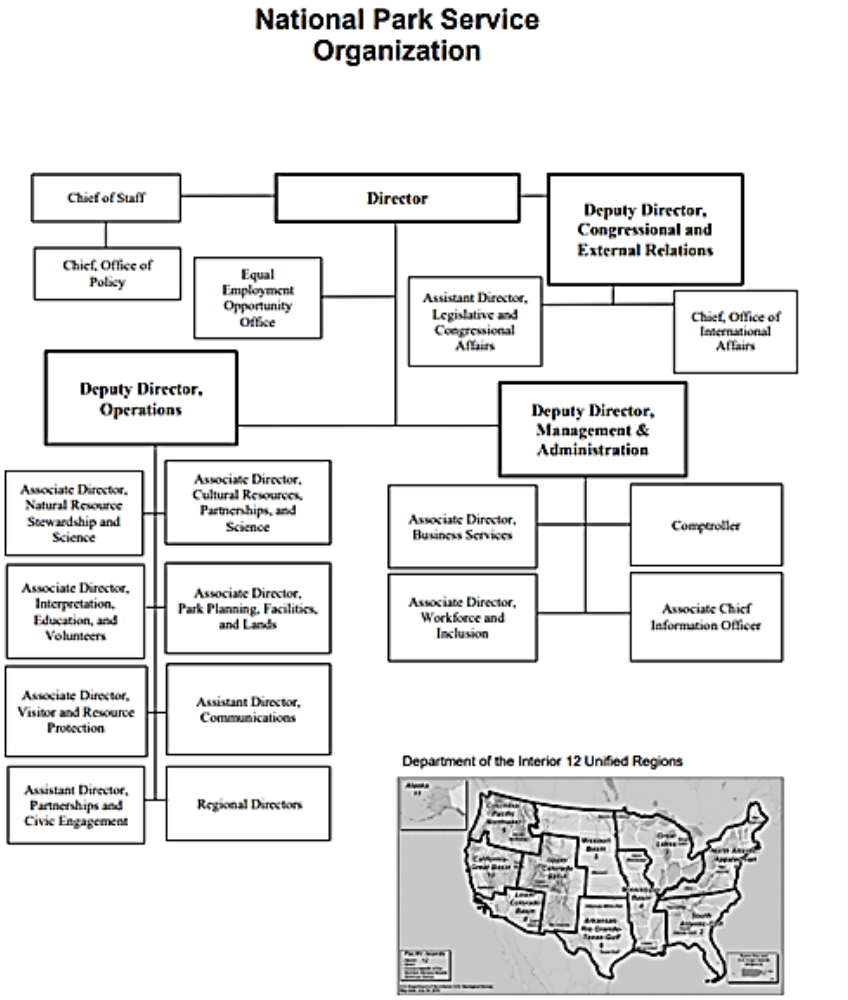

Figure 2: National Park Service Organization (Source: Adapted from <https://www.nps.gov/aboutus/NPS-Org-Chart.pdf>)

3.1.3 Legal Authority of the National Park System

All laws governing National Parks are compiled in Title 54 of the United States Code (USC.).[59] As a federal agency, the NPS also promulgates regulations governing park use; NPS regulations are codified in Title 36 of the Code of Federal Regulations (CFR). Regulations are a higher authority than NPS policy (but lower than federal law). Therefore, regulations must

[59] 54 U.S.C. §§ 100101–320303.

not conflict with laws. 36 CFR contains regulations applying "to all persons entering, using, visiting, or otherwise within the boundaries of federally owned lands and waters administered by the National Park Service."[60] Beyond regulations that apply to all parks, the superintendent of a park may also establish park specific regulations.[61]

Because regulations have the force of law, violating them carries a possible criminal penalty.[62] The case of Samantha Dehring is illustrative: Samantha, a 25 year-old woman, "is facing four days in jail, [and] a one-year ban from Yellowstone National Park and other penalties for not staying far enough away from a grizzly bear and her cubs during an encounter."[63] Yellowstone National Park's regulations require park visitors to remain "at least 100 yards (91 M) away from bears and wolves, and at least 25 yards (23 m) away from all other animals, including bison and elk."[64] A YouTube video of Samantha Dehring shows the young woman dangerously close to a bear, just before it charged at her (see Figure 3).[65]

Figure 3: A video of Samantha Dehring (*Source*: NPS, <https://nps.gov/yell/playyourvisit/safe>)

Yellowstone National Park's authority to create regulations to control behaviour within the park comes from the NPS, whose authority comes from Congress. Consistent with law, and based upon maintaining public health and safety, protection of the environment or natural or cultural resources, a Park's superintendent may: "(1) Establish, for all or a portion of a park area, a reasonable schedule of visiting hours, *impose public use limits*, or close all or a portion of a park area to all public use or to a specific use or activity; (2) Designate areas for a specific use or activity, or *impose conditions or restrictions* on a use or activity"[66] So, although all parks within the

60 36 C.F.R. § 1.2(a).
61 36 C.F.R. § 1.5.
62 *See* 36 C.F.R. § 1.3; 18 U.S.C. § 1865.
63 Joe Hernandez, 'A woman was given 4 days in jail for getting too close to grizzlies in Yellowstone' NPR News (10 October 2021), <https://www.wpr.org/woman-was-given-4-days-jail-getting-too-close-grizzlies-yellowstone, accessed on 20 May, 2023; See also, Illinois woman charged in Yellowstone case involving a grizzly receives four days in federal custody and fines, NPS (7 October 2021), <https://www.nps.gov/yell/learn/news/211007.htm>, accessed 20 May 2023.
64 *Yellowstone Safety*, NPS, <https://www.nps.gov/yell/planyourvisit/safety.htm> (last updated Oct. 4, 2021) accessed on 20 May, 2023; See also *Yellowstone Regulations*, NPS, <https://www.nps.gov/yell/planyourvisit/rules.htm>, accessed 20 May, 2023.
65 Inside Edition, *Woman Arrested for Getting Too Close to Bear: Cops*, YouTube (July 31, 2021), <https://youtu.be/fiFYnks_vJo>, accessed 20 May 2023.
66 36 C.F.R. § 1.5(a).

national park system are controlled by one law, each park may also have park specific regulations applicable only within that park.

Park specific regulations are found within each park's Superintendent's Compendium,[67] which are enforceable pursuant to the authority given the superintendent of each park.[68] These compendiums are updated yearly and serve as public notice required under 36 CFR § 1.7.[69] It is important that all national parks are governed by one law, which sets general national standards on governance, standards, general protection of the land, and more.[70] However, it is equally important that each park has its own regulations governing specific features or issues within that park.[71] For example, in parks like Yellowstone where there is a need to protect bears from people and people from bears, the Superintendent's Compendium for that park will have bear specific regulations.[72] However, it would not make sense to have a law about bear management in a park like Grand Canyon National Park, where bears are not a factor in park management.

Regulations violated in National Parks do not go unpunished. The Yellowstone National Park's Superintendent's Compendium explicitly states the punishment for violating its regulations:

> "A person, who violates any provision of the regulations found in 36 CFR, Parts 1-7, or provisions of this Compendium, is subject to a fine as provided by law (18 USC. 3571) up to $5,000 for individuals and $10,000 for organizations, or by imprisonment not exceeding six months (18 USC. 3559), or both, and shall be adjudged to pay all court costs associated with any court proceedings. In addition, to any fines or imprisonment an individual may be subject to a period of probation not to exceed five years in length (18 USC 3561)."[73]

Samantha Dehring learned this first-hand. Finally, NPS management must also adhere to executive orders. Executive orders are the President's directives to agencies.

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67 *See*, *e.g.*, *Superintendent's Compendium*, NPS, <https://www.nps.gov/yell/learn/management/compendium.htm> (last updated June 21, 2021) accessed on 20 May 2023; *See also* Edward T. Keable et al., *Grand Canyon National Park Compendium*, NPS (17 August 2021), <https://www.nps.gov/grca/learn/management/upload/grca-supt-compendium.pdf>, accessed on 20 May 2023.

68 36 C.F.R. § 1.5; See also, Management Policies 2006, *supra* note 1, at 41–42 (noting that the Park Service recognizes the need for special designations within certain parks or areas).

69 *Superintendent's Compendium*, *supra* note 67.

70 *See* Title 54 of the United States Code; Title 36 of the Code of Federal Regulations; Management Policies 2006.

71 *See* Superintendents Compendiums for each park, two examples of which are referenced *supra* note 67.

72 *See* Sarah Davis & Cameron Sholly, *Yellowstone National Park Superintendent's Compendium*, NPS 8, 12–14, 21, 31–32 (2021), <https://www.nps.gov/yell/learn/management/upload/Yellowstone-SUPERINTENDENT-SCOMPENDIUM-2021_Signed.pdf> (designating specific areas for bear protection and regulating the use of certain bear safe products).

73 Davis & Sholly, *supra* note 72, at 6.

3.1.4 Interplay of State and Federal Laws within the Parks

The laws of the United States are fully applicable in national parks, and state law does not control what happens inside of park boundaries. However, that is not to say that national parks are havens from state laws. For example, Yellowstone National Park is "under the sole and exclusive jurisdiction of the United States. All the laws applicable to places under the sole and exclusive jurisdiction of the United States shall have force and effect in [Yellowstone]."[74] However, if someone commits a crime in Wyoming and flees to Yellowstone, the law specifically allows for fugitives to be served process and be subject to Wyoming's laws.[75]

Interestingly, when Congress first passed this law, there was also a clause that made all of Wyoming's laws (that were not contradicted by federal law) applicable within Yellowstone, but Congress later repealed this clause.[76] Now, Congress has made this situation applicable to all federal lands. 18 USC § 13 says that anyone who "is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated . . . shall be guilty of a like offense and subject to a like punishment."[77] There are several notable things about this statute. First, this law applies to all federal lands, including national parks. Second, if there is already a federal law or regulation dealing with the crime committed on federal land that law will apply. But if the state in which that federal land lies has a law making some act illegal and no federal law covers that activity, this federal law adopts the state law as its own. Third, there is a distinction here that may not be apparent at first but is notable. This law does not give states jurisdiction to enforce their laws within federal lands it adopts state law as its own. This means that the federal government still has law enforcement power within the parks, the law did not give any of that power to states.[78] To summarize, if someone commits an act within a national park that is a crime within the state that the federal park is located in, but for which federal law has no law against, 18 USC § 13 makes that state crime a federal crime, and the federal government can prosecute the act as illegal under a federal law. But ultimately, the federal government will decide whether to prosecute this crime, the state has no authority to do so because the act was committed on federal land, outside of the jurisdiction of the states.[79]

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74 16 U.S.C. § 24.

75 *See Ibid.*

76 *Compare* Act of May 7, 1894, Ch. 72, § 3, 28 Stat. 73 ("[I]f any offense shall be committed in said Yellowstone . . . which offense is not prohibited . . . by any law of the United States or by any regulation of the Secretary of the Interior, the offender shall be subject to the same punishment as the laws of the State of Wyoming . . . .") *with* 16 U.S.C. § 25 (repealing that law).

77 18 U.S.C. § 13.

78 *See* 18 U.S.C. § 3231.

79 For a much more detailed discussion of the applicability of state laws within federal jurisdiction, *see also* Warren H. Pillsbury, 'Law Applicable to National Parks and Other Federal Reservations Within a State' (1934) 22 Cal. L. Rev. 152.

3.2 Designation of Nation Parks and Management

3.2.1 Criteria for Selecting New National Park Units

An Act of Congress may create a new national park, but it is the NPS that recommends new areas to be protected through special resource studies.[80] Any potential additions to the national parks should contribute in their own special way to represent the natural and cultural resources of our nation.[81] The NPS, therefore, has four criteria when determining whether to recommend a new addition to the NPS: the addition must (1) possess nationally significant natural or cultural resources, (2) be a suitable addition to the system, (3) be a feasible addition to the system, and (4) require direct NPS management rather than protection by other agencies or the private sector.[82] This ensures that only the most outstanding examples of the nation are managed by the NPS, other agencies and institutions may manage the rest.[83]

To meet each of the four main criteria above, the NPS will look at numerous factors for recommending a new national park unit. To determine whether an area is nationally significant under number (1) above, the NPS will determine (a) whether it is an outstanding example of a particular type of resource, (b) whether it possesses exceptional value or quality in illustrating the natural or cultural themes of our nation's heritage, (c) whether it offers superlative opportunities for public enjoyment or scientific study, and (d) whether it retains a high degree of integrity as a true, accurate, and relatively unspoiled example as a resource.[84] To determine whether it is suitable under number (2) above, the NPS will determine, on a case-by-case basis, whether there are other similar areas already protected by the NPS, or other federal, state, local, or private agencies.[85] Some of the factors looked at in this determination are the character, quality, quantity, or combination of resource values; the rarity of the resources; the educational potential; and similar resources already protected and whether the proposed new area would expand, enhance, or duplicate opportunities already found in other comparably managed areas.[86] To determine the new area's feasibility under number (3) above, the area must be (a) of sufficient size and configuration to ensure sustainable protection and enjoyment, and (b) capable of efficient administration at a

[80] U.S. Dept. of Interior, Management Policies 2006 at 8 (2006), <https://www.nps.gov/subjects/policy/upload/MP_2006.pdf>, accessed on 20 June 2023. For example, the NPS is currently conducting a study to determine whether to add Fort Ontario as a new National Park. New York currently owns and manages the site, but it has been threatened with budget cuts. Rob Hotakainen, *NPS studying N.Y. Holocaust shelter as possible park site*, (28 October 2021); *See also* 54 U.S.C. § 100507 (directing the Secretary of the Interior to recommend areas to study for inclusion in the park system, which shall be studied by the NPS when Congress authorizes it).

[81] Management Policies 2006, *supra* note1, at 8.

[82] *Ibid.*

[83] *Ibid.*

[84] *Ibid.* at 8–9.

[85] *Ibid.*

[86] *Ibid.*

reasonable cost.[87] The factors for feasibility include: size; configuration; current and potential uses; landownership; public enjoyment potential; costs; access; threats to the resources; staffing requirements; zoning; the level of support; and the potential economic/socioeconomic impacts.[88] To determine the final factor, (4), above, the NPS will only accept the management of the area if they determine that NPS is the "clearly superior alternative" to other current management (other federal agencies, state, local, or private management).[89] If an area meets the nationally significant criteria, but not others, the NPS and a non-federal management entity might enter an agreement to make a "heritage area" rather than a new unit of the NPS.[90]

For example, in 2009, Congress directed the NPS to conduct studies on twelve new potential sites for NPS management.[91] Congress directed the NPS to conduct a special resource study to determine whether the area met the four criteria for federal protection listed above.[92] After conducting the study, NPS determined that the area was both nationally significant and suitable for inclusion in the national park service; however, it was not feasible for the NPS to maintain.[93] Because it was not feasible, NPS did not make a finding on whether there was a need for direct NPS management.[94]

3.2.2 Zoning Management

Each park maintains a zoning system with permissible uses designated in each area. Zoning within a National Park is approved within each park's general management plan.[95] Management zones are set up within each park that outlines appropriate uses and facilities necessary to support the intended uses of specific parts of the park.[96] These zones illustrate the differences in intended resource conditions, visitor experiences, and management activities within the park.[97] The only barrier to these management zoning plans are when areas within the park have been designated as wilderness.[98] When an area has been zoned as a wilderness area, any other zoning within that area may not diminish or reduce the maximum protection afforded to the area by its wilderness designation.[99] Indeed, the NPS is bound by wilderness laws as well and

87 *Ibid.*
88 *Ibid.*
89 *Ibid.*
90 *See ibid.* at 9–10 for more information.
91 *See* Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 7201–12, 123 Stat. 991, 1205–12.
92 *Ibid.*
93 See *Battle of Camden and Historic Camden Special Resource Study*, NPS 2–3 (2015), <https://parkplanning.nps.gov/document.cfm?parkID=525&projectID=33779&documentID=68991>, accessed on 21 June 2023.
94 *Ibid.* For more documents related to park planning, *see* <https://parkplanning.nps.gov/parks.cfm>, accessed on 21 June 2023.
95 Management Policies 2006, *supra* note 1, at 24.
96 *Ibid.*
97 *Ibid.*
98 *Ibid.* at 81.
99 Ib*id.*

citizens may bring suit if the NPS is carrying out prohibited activities within a wilderness area.[100]

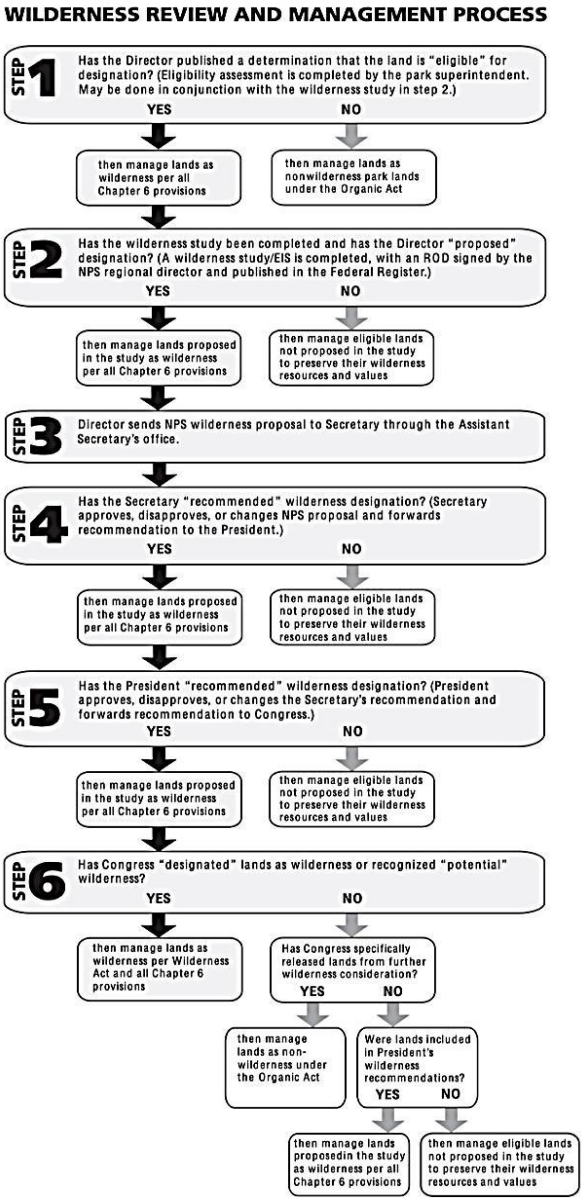

Figure 4: Wilderness Review (*Source*: NPS, Management Policies 2006, page 80).

The Wilderness Act, discussed above, allows Congress to designate an area as wilderness (see Figure 4 for the process of designating a wilderness area).[101] A wilderness area should be: untrammeled by humans; undeveloped and in its primeval state without permanent improvements or habitation; affected only by the forces of nature and not human work;

[100] *See, e.g.*, Wilderness Watch v. Mainella, 375 F.3d 1085 (11th Cir. 2004) (NPS's use of passenger vans across wilderness area is not an acceptable use).

[101] Wilderness Act, Pub. L. No. 88-577, 78 Stat. 891 (1964), <https://uscode.house.gov/statutes/pl/88/577.pdf>, accessed on 10 July 2023.

protected and managed to preserve its natural conditions; and allow for solitude and primitive recreation.[108] Once Congress designates an area as wilderness, a whole host of other restrictions are added to the land.[102] A national park, though meant to be enjoyed by the public, should also be preserved for future generations, and the natural beauty and processes should be preserved. Therefore, most parks should be designated as wilderness. For example, more than 90% of the Grand Canyon National Park has been proposed for wilderness.[103] Although Congress has yet to act on Grand Canyon's proposed wilderness,[104] the NPS still manages the land as if it were wilderness.[105]

The Grand Canyon General Management Plan from 1995 shows a good example of different management zones within a park.[106] Management zones are "based on an evaluation of the congressionally established purposes of the park; the nature of the park's natural and cultural resources; all past, existing, and anticipated uses; and park management objectives."[107] Grand Canyon designated three main zones in the park, with several other subzones.[108] Natural Zones are lands and waters managed to conserve natural resources and ecological processes; they may be used by the public in ways that do not interfere with these resources and processes.[109] Cultural Zones are lands managed for the preservation, protection, and interpretation of cultural resources, providing for public use and enjoyment.[110] Development Zones are lands managed to provide and maintain facilities serving park visitors and managers.[111] These are areas where park development and intensive use has substantially altered the natural environment; these impacts and the area should be as small as necessary to accommodate the required development and use.[112] Connecting development zones are Transportation Subzones: these are generally connected by paved roads or rail corridors and are no wider than

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102 *See ibid.* at 77–88.

103 National Park Service, *General Management Plan: August 1995*, U.S. Dept of Interior 20 (1995) <https://www.nps.gov/grca/learn/management/upload/GRCA_General_Management_Plan.pdf>, accessed on 10 July 2023.

104 *See* Final Wilderness Recommendation 2010 Update: Grand Canyon National Park Arizona, National Park Service, U.S. Dept. of Interior (2010), <https://www.nps.gov/grca/learn/management/upload/Draft_2010_Final_Wilderness_Rec.pdf>, accessed on 20 September, 2023.

105 *Parks with Wilderness*, National Park Service, <https://www.nps.gov/subjects/wilderness/wildernessparks.htm> (last updated July 27, 2021), accessed on 10 July 2023. "Many national park units have 'other categories of wildernesses - lands not designated, but managed as wilderness per NPS policy. Together with NPS designated wilderness, this means over 80 percent of *all* NPS lands are managed as wilderness."

106 General Management Plan: August 1995, *supra note 103.*

107 *Ibid.* at 19.

108 *Ibid.* at 19–21.

109 *Ibid.* at 19.

110 *Ibid.*

111 *Ibid.*

112 *Ibid.* at 19–20.

necessary for safe travel.[113] Finally, Utility Subzones bring utilities into development zones from outside of the protected area.[114]

3.2.3 Special Use Permits

Generally, every park will have "appropriate uses" that are allowed in each park.[115] The NPS must define appropriate uses within each park because of the conflict in the Organic Act between "conserv[ing] the scenery and the natural and historic objects and the wildlife therein *and* [] provid[ing] for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[116] Parks, therefore, must determine appropriate uses (see Figure 5) by making sure they are (1) consistent with applicable laws, executive orders, regulations, and policies; (2) consistent with existing plans for public use and resource management; (3) mindful of the actual and potential effects on park resources and values; (4) mindful of the cost to the NPS; and (5) mindful of whether the public interest will be served.[117]

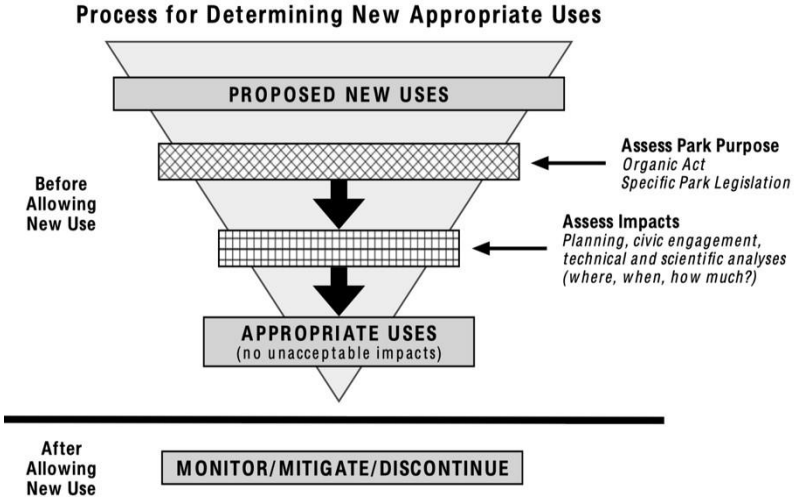

Figure 5: New Approaches (*Source*: Adapted from Management Policies 2006 at 99 (2006))

For activities that are not "appropriate uses" to take place within a national park, an individual, group, or organization will need to get a special use permit (SUP) from the NPS.[118] A SUP is needed when an entity

[113] *Ibid.* at 20.
[114] *Ibid.*
[115] Management Policies 2006, *supra* note 1, at 98–107.
[116] *Organic Act of 1916*, NPS, <https://www.nps.gov/grba/learn/management/organic-act-of-1916.htm> (Last updated April 22, 2021), accessed on 10 July 2023.
[117] Management Policies 2006, *supra* note 1, at 98.
[118] *Special Use Permits (SUP)*, NPS, <https://www.nps.gov/frst/planyourvisit/special-use-permits-sup.htm> (Last update Sept. 30, 2021), accessed on 20 August 2023; *see also Special Use Permits*, NPS, <https://home.nps.gov/depo/planyourvisit/special-usepermits.htm> (last updated August 6, 2021), accessed on 20 November 2023; Management Policies 2006, *supra* note 1, at

wishes to do an activity that (1) provides a benefit just to them rather than the public at large, and (2) requires management from the NPS to protect park resources and the public interest.[119] The NPS sets strict criteria to receive a SUP due to the special nature of a national park and its purpose. The activity must not: cause injury, damage, or impairments to park resources; be contrary to the purpose for which the park was established and the mission of the NPS; unreasonably impair the atmosphere of peace and tranquillity maintained in wilderness, natural, historic, or commemorative locations within the park; interfere with visitor use, access, and programs; interfere with park management or administration; interfere with concession operations or other public facilities; or present a clear and present danger to public health and safety.[120] Often, the activities requested are special events, such as religious gatherings, ceremonies, and camps, or First Amendment activities of 25 people or more.[121]

Sometimes, however, these special uses may be longer term, such as an agricultural use.[122] These uses are typically governed by a historic use at the site, or if "(1) they are authorized by the park's enabling legislation, (2) they are retained as a right subsequent to NPS land acquisition, (3) they contribute to the maintenance of a cultural landscape, or (4) they are carried out as part of a living exhibit or interpretive demonstration."[123] An example of (2) above is shown in Drakes Bay Oyster Co. v. Jewell.[124] In that case, an oyster harvesting operation sold its land to the United States to be a part of the Point Reyes National Seashore.[125] However, as a part of the sale, the oyster company retained a 40-year permit to continue operating the harvesting of oysters from the area.[126] The permit said that at the end of the 40 years, a SUP *may* be issued to continue the operations in accordance with NPS regulations.[127] When the permit expired, the Secretary decided not to renew it.[128] The oyster company brought suit, challenging the Secretary's decision to let the permit lapse.[129] The court held that the Secretary had statutory discretion on whether to extend or deny a new permit and did not intercede in his discretionary decision.[130]

112–18; NPS, Director's Order #53: Special Park Uses, U.S. Dept. of Interior (23 February 2010), <https://www.nps.gov/policy/DOrders/DO53.htm>, accessed on 10 July 2023.

119 *Special Use Permits (SUP)*, NPS, <https://www.nps.gov/frst/planyourvisit/special-use-permits-sup.htm> (Last update Sept. 30, 2021), accessed on 20 July 2023.

120 *Ibid.*

121 *Ibid.*

122 Management Policies 2006, *supra* note 1, at 116.

123 *Ibid.*

124 Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073 (2014).

125 Elena Idell, 'A Battle Over Oysters: Drakes Bay Oyster Co. v. Jewell and its Aftermath' (2018) 10 Golden Gate U Envtl L J 33, 42.

126 *Ibid.*

127 *Ibid.* at 43.

128 Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1077 (2014).

129 *Ibid.*

130 *Ibid.* at 1078.

4. MEETING THE CHALLENGES: SPECIFIC ISSUES FACING THE US NATIONAL PARKS

The United States' national parks face many threats. From a lack of funding to climate change to an overabundance of visitors, America's national parks need strong protections to maintain their wild and natural states. Better NPS management can solve some issues; however, some need collaboration between the NPS and other federal or local agencies. Other issues need congressional action, and some will need a worldwide effort to solve. But countries looking to implement their own national park systems can be better off by recognizing and learning from issues facing America's national parks. Subsection a briefly discusses some issues facing America's National Parks. Subsections b–e go into more detail on lessons that America has learned in its more than one-hundred years managing national parks.

4.1 A Quick Summary of Some Issues Facing US National Parks

4.1.1 Lack of Funding for the National Park Service

One perennial issue facing US national parks is their lack of funding. "For decades, budgets for park operations have fallen far short of basic needs, failing to keep pace with either the physical expansion of the system or the growing complexity of its mission."[131] Indeed, Congress appropriates to the NPS an amount far short of the value Americans place on the parks, and far short of what the parks need to face the challenges ahead.[132] Currently, the Park Service has deferred maintenance on projects totalling $11.9 billion –– almost four times the amount Congress gave the NPS in 2021.[133] The lack of funding also means the NPS cannot purchase land that Congress has authorized purchases for. Congress should increase the NPS's budget, not only because of the high value Americans place on the parks, but also because there are actual economic benefits from national parks; for every $1 in taxpayer funds spent on parks, at least $4 in economic benefits came back to the US economy.[134]

4.1.2 Invasive Species Destroying Natural Ecosystems

Another concern facing the parks is invasive species, which are non-native organisms that overpopulate and negatively alter their new

[131] Howard H. Baker and J. Bennett Johnston, *Advancing the National Park Idea: National Parks Second Century Commission Report* (2009) 38

[132] The Conversation, *Americans Value National Parks, but Funding Is Lacking*, U.S. NEWS (Aug. 19, 2016), <https://www.usnews.com/news/articles/2016-08-19/americans-value-national-parks-but-funding-is-lacking>, accessed on 10 July, 2023; Rob Hotakainen, 'National parks face tough calls battling climate change' (E&E NEWS, 5 November 2021).

[133] Congress gave the NPS $3.1 billion in 2021, only 7% of which is actually budgeted for construction. *What is Deferred Maintenance?*, NPS, <https://www.nps.gov/subjects/infrastructure/deferred-maintenance.htm>, (last updated January 15, 2021); *National Park Service: FY2021 Appropriations*, Cong. Res. Serv. (last updated Oct. 12, 2021), <https://crsreports.congress.gov/product/pdf/IF/IF11661>; Baker & Johnston, *supra* note 138, at 38.

[134] *Ibid.*

environment. In 2009, invasive species caused at least $20 billion in damages to park lands.[135] Invasive species can displace native organisms and even kill them. Indeed, the mission of the NPS is to preserve America's natural and cultural resources *unimpaired* –– an invasive species is antithetical to that mission. The best method for controlling invasive species is to prevent them in the first place; once they have a foothold in an area it becomes much more difficult and expensive to eradicate them.[136] So the NPS tries to identify invasive species early after their introduction, then the NPS can effectively remove them from an area.[137] Finally, when all else fails and the species has established a population, the park service moves into "long-term control and eradication."[138] The goal here is either to completely eradicate the species, which can be very costly, or to control the species "so that it does as little harm as possible to the park and visitors."[139] Animals are not the only concern either; plants can also be costly and damaging invasive species.[140] Indeed, over 1.4 million acres of NPS land are infested with invasive plants, and only 43,000 of those acres are considered controlled.[141]

4.1.3 Overabundance of Native Wildlife

Beyond invasive species, the NPS must also manage native animals. Two major problems exist with native wildlife management within national parks. First, animals, unlike humans, do not recognize boundaries and may travel outside of protected areas into human developments and be hurt or cause damage. Second, when the protected area is not large enough to sustain an appropriate amount of apex predators, species such as elk or bison may grow too large and cause damage to natural ecosystems within parks.[142] For the first problem, the NPS has long recognized the need to establish wildlife corridors between protected areas to connect diverse populations of species and to decrease harmful human-animal encounters.[143] Another good practice is for nearby protected areas to openly communicate and plan wildlife management across boundaries. The Crown of the Continent in northern Montana and southern Canada, which

135 Baker & Johnston, *supra* note 131, at 35.
136 *Managing Invasive Animals*, NPS, <https://www.nps.gov/subjects/invasive/managing-invasive-animals.htm> (last updated May 12, 2021), accessed on 10 May 2023.
137 *Ibid.*
138 *Ibid.*
139 *Ibid.*
140 *See Invasive Plants*, NPS, <https://www.nps.gov/subjects/invasive/plants.htm>, accessed on 21 July 2023.
141 *Ibid.*
142 See, e.g., *Wildlife Management*, NPS, <https://www.nps.gov/thro/learn/nature/wildlife-management.htm> (last updated August 13, 2020), accessed on 10 April 2023. For other examples of how the Fish and Wildlife Service encourages wildlife migration *see Wildlife Corridors*, U.S. Fish & Wildlife Service, <https://fws.gov/refuges/features/wildlife-corridors.html> (last updated 31 October 2019), accessed on 20 June 2023.
143 See *Caltrans and NPS Retrofit Project Helps Wildlife Cross Highway 118*, NPS (14 April 2021), <https://www.nps.gov/samo/learn/news/caltrans-and-nps-retrofit-project-helps-wildlife-cross-highway-118.htm>; Crown Managers Partnership, <https://www.crownmanagers.org/about-the-crown> , accessed on 20 May 2023.

includes Glacier National Park, is an example of transboundary management of protected areas.[144]

Moving to the second major issue concerning native wildlife management within parks: what can park managers do when a lack of natural predators causes populations of elk, bison, and other animals to skyrocket and cause harm to the ecosystem? Two options are available to park managers: Yellowstone provides examples of both. Yellowstone National Park has had to manage an overabundance of elk and bison for many years. The first method park managers have used is reintroducing wolves into Yellowstone. Wolves had been extinct in the park for close to 70 years, and during this time the elk population had exploded, causing ecological damage to native plant life and ecosystems.[145] Before wolf reintroduction, the elk population was at an unsustainable high of almost 19,000 elk.[146] 18 years after wolf reintroduction, the elk population was at a worrisome low of less than 4,000 elk.[147] Now the populations of both have stabilized and there is a healthier population of about 7,000 elk.[148] The reintroduction of natural predators helped stabilize an overabundant elk population and helped the overall ecosystem in the park to improve.[149] Ultimately, the park service will restore a once native species to an area only when: (1) sufficient habitat exists to support the species; (2) management of the species can prevent serious threats outside the park; (3) the restored species most nearly resembles the previous native species; and (4) the elimination of the native species was human caused.[150]

Another method park managers use to manage an unhealthy overabundance of wildlife in Yellowstone is culling. Some animal populations, like bison, were not affected by wolf reintroduction in the park and needed a different tool.[151] Eight federal, state, and tribal entities work together as part of the Interagency Bison Management Plan to maintain a healthy number of bison in and around the park.[152] The meat and hides of the culled bison are given to tribal members as part of the NPS's cooperative Plan.[153]

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144 Crown Managers Partnership, <https://www.crownmanagers.org>, accessed on 20 May 2023.
145 Douglas Smith et al., *Wolf Restoration in Yellowstone: Reintroduction to Recovery*, 24 Yellowstone Science, <https://www.nps.gov/articles/wolf-restoration-in-yellowstone-reintroduction-to-recovery.htm>, accessed on 10 July 2023.
146 *Yellowstone Elk*, NPS, <https://www.nps.gov/yell/learn/nature/elk.htm> (last visited November 10, 2021), accessed on 10 July 2023.
147 *Ibid.*
148 *Ibid.*
149 *Wolf Restoration*, NPS, <https://www.nps.gov/yell/learn/nature/wolf-restoration.htm>, accessed on 10 July 2023.
150 *Ibid.*
151 *Questions & Answers about Bison Management*, NPS, <https://www.nps.gov/yell/learn/management/bisonmanagement-faqs.htm> (last updated February 24, 2021), accessed on 10 July 2023.
152 *Ibid.*
153 *Ibid.*

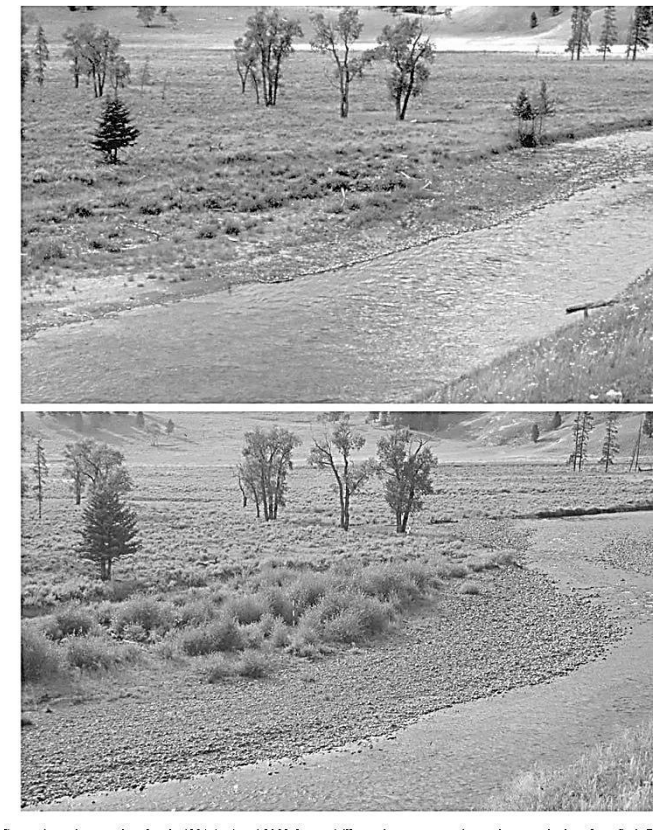

Figure 5: Healthy Regrowth of Vegetation after the Re-Introduction of Natural Predators for Elk in Yellowstone National Park.[154]

4.1.4 Climate Change

Another major issue negatively impacting national parks is climate change. From forest fires destroying ancient sequoias in Sequoia National Park,[155] to Glacier National Park losing its glaciers,[156] –– to drought, flooding, heat waves, sea-level rise, and other climate change related disasters –– park managers are having to make difficult decisions on what and how to protect America's most wonderful natural resources.[157] The NPS has developed an adaptation framework that allows park managers to Resist climate change when feasible; accept climate change when infeasible, small, or acceptable; or

[154] William J. Ripplea and Robert L. Beschta, 'Wolf Reintroduction, Predation Risk, and Cottonwood Recovery in Yellowstone National Park' (2003) 184 Forest Ecology and Management 299–313, <https://doi.org10.1016/S0378-1127(03)00154-3>.

[155] Associated Press, *California Wildfires Make A Run Toward A Giant Sequoia Grove*, NPR (18 September 2021), <https://www.npr.org/2021/09/18/1038635790/california-wildfires-threaten-giant-sequoia-grove>, accessed on 10 July 2023.

[156] *Status of Glaciers in Glacier National Park*, USGS, <https://www.usgs.gov/centers/norock/science/retreatglaciers-glacier-national-park?qt-science_center_objects=0#qt-science_center_objects>, accessed on 10 November 2023 (predicting Glacier National Park will have no glaciers left by 2100).

[157] *See* Rob Hotakainen, 'National parks face tough calls battling climate change', E&E NEWS, 5 November 2021; *see also* Baker & Johnston, *supra* note 129, at 26.

direct change in a desirable direction when feasible.[158] An analogy is that climate change is like a strong wind pushing a sailboat (parks):

> "To accept is to lower the sails and allow the boat to move with the winds, arriving wherever they lead. To direct is to use the winds, via sails and rudder, to steer the boat to a specific new preferred destination, both far from home port and from where the winds alone would take it. To resist is to lower the sail and fight the prevailing winds, using a motor to attempt to return to home port."[159]

Each park will have to assess which of the three strategies is best suited to them.

4.1.5 Too Many Visitors Damaging Park Resources

Finally, some parks face an issue of having become so popular that visitors "love them to death."[160] As national parks become more popular, the tension between "enjoyment" and "protection" becomes ever tauter. Increased visitors to national parks interfere with wildlife, and bring increased vandalism, trash, and reckless behaviour.[161] Some parks manage excess vehicles by not allowing private vehicles into the parks; visitors must hike or ride on free shuttle buses within the park.[162] Other parks limit the number of cars allowed per day, or people allowed per hour, in the most popular areas or trails.[163] Yet others are turning to selfie stations, timed tickets, algorithms, and autonomous vehicles[164] –– there is no easy answer, and sometimes parks just need to limit visitors to protect natural resources. Indeed, because of the NPS's mandate to leave park resources unimpaired for future generations, conservation should be prioritized over enjoyment.[165] For example, parks sometimes try to increase development to accommodate more visitors but courts enjoin them from continuing due to their protection mandate.[166]

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158 National Park Service, 'Planning for a Changing Climate: Climate-Smart Planning and Management in the National Park Service', (2021) 9, <https://irma.nps.gov/DataStore/DownloadFile/662814>, accessed on 12 July 2023.

159 *National parks face tough calls battling climate change*, *supra* note 156.

160 *See* Dayton Duncan, 'Are We Loving Our National Parks to Death?' New York Times (6 August 2016), <https://www.nytimes.com/2016/08/07/opinion/sunday/are-we-loving-our-national-parks-to-death.html>, accessed on 10 July 2023.

161 Katherine Gammon, 'US National Parks are overcrowded. Some think "selfie stations" will help' The Guardian (31 August 2021), <https://www.theguardian.com/environment/2021/aug/31/us-national-parks-crowd-controlstrategies>, accessed on 10 July 2023.

162 *See*, e.g., *Zion Canyon Shuttle System*, NPS, <https://www.nps.gov/zion/planyourvisit/zion-canyon-shuttlesystem.htm>, accessed on 10 July 2023.

163 *See*, e.g., *Glacier Basic Information*, NPS, <https://www.nps.gov/glac/planyourvisit/basicinfo.htm>, accessed on 10 July 2023 (giving notice that in 2021 Glacier National Park instituted an online reservation system for getting a daily pass on the Going-to-the-Sun Road, the most popular corridor in Glacier); Associated Press, 'Iconic sheer trail at Zion National Park to require permits' E&E NEWS, 6 December 2021.

164 Gammon, *supra* note 160.

165 *See* National Parks Conservation Ass'n v. U.S. Dept. of the Interior, 835 F.3d 1377 (11th Cir. 2016).

166 *See* Sierra Club v. Lujan, 716 F.Supp. 1289 (D. Ariz. 1989) (ordering a preliminary injunction on the park from constructing a hotel and restaurant on the North Rim of the Grand Canyon).

4.2. Indigenous Peoples and Protected Lands: A Forced Relocation

Native peoples once lived in national parks, indeed, they used the area's resources for sustenance; in some areas, and Indigenous people had utilized "park resources" for 10,000 years prior to European settlers and "protection" of the land.[167] These peoples, like Oglala Sioux spiritual leader, Black Elk, were forced off of their lands and relocated to less desirable places: "the Americans had 'made little islands for [Native Americans] and other little islands for the four-leggeds [animals],' and every year the two were moving farther and farther apart. In short, Black Elk understood all too well that wilderness preservation went hand in hand with native dispossession."[168] Native Americans lived in and depended on Yellowstone for thousands of years, even after the creation of Yellowstone Park. Native Tribes endured conflicts, legal challenges, and forced removal for decades after the creation of the park, until eventually the government had fully displaced Native Americans from parks. The same trend has occurred in many of America's national parks.[169] Now, a person who refuses to give up possession of land lying within a national park may face trespass charges.[170] Further, there are many sacred places within protected areas that Native Americans are now excluded from.[171] Indeed, due to the largely natural states that many native peoples kept their land in, "Large parts of Indigenous peoples' customary territories are now national parks and other kinds of protected areas dedicated to the long-term conservation of biodiversity."[172] In some of these "protected" areas, Indigenous peoples have been deprived of their land, in others, they have been allowed to remain, but deprived of the governance of the land.[173]

Looking back, major tragedies took place in the US government's "protection" of lands –– a newly formed system would do well to learn from these tragedies and find a better solution for the protection of ecological resources and Indigenous peoples' rights. Indeed, new international conventions call for biodiversity conservation that recognizes, respects, and supports Indigenous peoples' conservation achievements and for working with them to respect their ownership, sovereignty, rights, and responsibilities.[174] In an ideal situation, some areas would be conserved as strict wilderness with Indigenous people's free, prior, and informed consent; some would be protected from harmful human activities or

[167] *American Indians*, NPS, <https://www.nps.gov/glac/learn/education/american_indians.htm>, accessed on 10 July 2023.
[168] Mark David Spence, *Dispossessing the Wilderness: Indian Removal and the Making of the National Parks* (1999) 13.
[169] *See generally ibid; see also ibid.* at 105–06 ("If anything, Yellowstone served as a prelude for later conflicts between government officials and native groups at other national parks.").
[170] *See* 54 U.S.C. § 103304.
[171] *See* Andrea Salcedo, 'National Park Service investigates video showing a ranger using a Taser on a Native American man walking his dog off-trail' Washington Post, 30 December 2020.
[172] Stan Stevens (ed.), *Indigenous Peoples, National Parks, and Protected Areas: A New Paradigm Linking Conservation, Culture, and Rights* (University of Arizona Press, 2014) [Hereinafter INDIGENOUS PEOPLES].
[173] *Ibid.*
[174] *Ibid.* at 7.

development while still protecting customary practices that contribute to cultural and biological diversity.[175]

In 2003, the World Parks Congress radically changed the policy of protected areas regarding Indigenous peoples and conservation.[176] They established a "new protected area paradigm" which advocated for reforms in the management and protection of areas.[177] Several commitments involving protected areas and Indigenous peoples came out of this accord. The Worlds Park Congress committed to foster integral relationships of people with protected areas; involve Indigenous peoples in the creation, proclamation, and management of protected areas; ensure the participation of Indigenous peoples in relevant decision making; support protected area management that strives to reduce poverty; ensure the benefits of protected areas are shared with Indigenous peoples and local communities; foster adaptive, collaborative, and co-management strategies; support community conservation areas; and value and use scientific and traditional conservation knowledge.[178] Indeed, Indigenous peoples' goals are often compatible with protected areas; they just do not want to be excluded from, and want to be involved in the governance of, the land they have lived with for millennia.[179] These goals acknowledge that Indigenous peoples should be "rights-holders" not just "stakeholders" in protected lands.[180] The congress ultimately ended with three main goals and twenty-nine supporting goals for rights based reform and redress for past injustices to Indigenous peoples excluded from their land in the name of protection.[181] Many of these goals can be boiled down to making sure Indigenous peoples give their free, prior, and informed consent to new conservation efforts on their historic lands; conservation decisions must reflect Indigenous peoples wishes rather than be forced upon them.

Recognized Native American Tribes with reservations in the US have powers and sovereignty on that land like that of a state.[182] Thus, some Native American tribes have examples of fully Native governed tribal parks within their lands. For example, the Confederated Salish and Kootenai tribes established the Mission Mountains Tribal Wilderness in 1982.[183] Because it is located within tribal lands and managed by the Natural

[175] *Ibid.* at 8. Indeed, there are more and more calls for Indigenous leadership in conservation efforts of protected lands. Some cultural practices, such as controlled burning in forests, may actually be more effective at reducing the severity of wildfires that now plague western federal forests every year. *See* Nico Portuondo, 'Panels hear pleas for Indigenous leadership in conservation' E&E NEWS, 27 October 2021.

[176] Indigenous Peoples, *supra* note 171, at 47.

[177] *Ibid.*

[178] *Ibid.* at 52–53.

[179] *Ibid.* at 49.

[180] *Ibid.* at 49.

[181] *Ibid.* at 55. Differences between the old and new paradigm of conservation practices can be found in Table 2.2 of Indigenous Peoples at page 62–63. The table includes key differences between the old and new on rights, establishment of parks, governance of parks, knowledge base and goals, management principles, and settlement within parks.

[182] Wayne Edwards, *Sovereignty and Land Rights of Indigenous Peoples in the United States* (Palgrave Macmillan, 2020) 39–40.

[183] *Ibid.* at 73.

Resources Department of the tribes, visitors must purchase a Tribal Conservation Permit to access the area.[184] Other tribal protected areas in North America include Ute Mountain Tribal Park,[185] the four Tla-o-qui-aht First Nations tribal parks,[186] Monument Valley Navajo Tribal Park,[187] and the Haida Heritage Sites.[188] Some of these conserved territories are not nationally or internationally recognized––indeed, some tribes do not seek recognition in the face of possible lost autonomy––however, many of these fully-Indigenous-protected areas meet criteria for Indigenous Conservation Territories.[189]

However, for areas where Indigenous peoples do not assert sole authority over an area, but still maintain rights within it, shared governance (or co-management) can be an effective solution to make sure Indigenous peoples are treated with respect in governing their native lands.[190] Far too often, a system is designated as co-management, and then power-sharing is not done equitably with Indigenous peoples.[191] When done right––when Indigenous peoples and state governments fully share in decision making––shared governance can be one of the most effective conservation-related resources.[192]

Once a Tribe has been federally recognized as a sovereign, the door for government-to- government relations opens, including co-management of historically Native lands.[193] The US has several examples of co-management with Tribal Nations in federally protected areas––not perfect by any means –– including in Canyon de Chelly National Monument in Arizona, the South Unit of Badlands National Park, and Timbisha Shoshone partnerships in managing Death Valley National Park.[194] In Canyon de Chelly, the NPS and the Navajo Nation work together to manage the

184 *Wildland Recreation Program*, Nat. Res. Dept. of the Confederated Salish and Kootenai Tribes, <http://csktnrd.org/fwrc/recreation>, accessed on 10 July 2023.

185 *Ute Mountain Ute Tribal Park*, <http://www.utemountaintribalpark.info> (last visited October 27, 2021), accessed on 10 July 2023.

186 *Welcome to the Tla-o-qui-aht First Nation*, Tla-O-Qui-Aht First Nation, <https://www.tla-o-qui-aht.org>, accessed on 27 October 2023; *Tla-o-qui-aht Tribal Parks*, <https://tribalparks.com>, accessed on 27 October 2023.

187 *Monument Valley Navajo Tribal Park*, Navajo Nation Parks & Recreation, <https://navajonationparks.org/tribal-parks/monument-valley/>, accessed on 27 October 2023.

188 *Haida Heritage Center at Kay Llnagaay*, <https://haidaheritagecentre.com>, accessed on 27 October 2023.

189 Indigenous Peoples, *supra* note 171, at 72–73; *Territories and Areas Conserved by Indigenous Peoples and Local Communities*, ICCA Consortium, <https://www.iccaconsortium.org/index.php/discover/>, accessed 27 October 2023.

190 Indigenous Peoples, *supra* note 171, at 76.

191 *Ibid.* at 76. *See also ibd.* ch. 12; Brad Coombes, 'Nature's Rights as Indigenous Rights? Mis/recognition through Personhood for Te Urewera' Espace populations sociétés (2020).

192 *Ibid.* at 76. *See* INDIGENOUS PEOPLES chapters 5, 6, 9, 10, and 12 for discussions on different power sharing arrangements and their inclusiveness, as well as some common issues that come up.

193 *Ibid.* at 44.

194 Indigenous Peoples, *supra* note 171, at 79. For more information on the NPS and partnering with Indigenous groups *see Connecting with American Indians, Alaska Natives, and Native Hawaiians*, NPS, <https://www.nps.gov/history/tribes/index.htm> (last updated June 2, 2016) and associated links within.

land.[195] First, the Navajo Nation gave the President their consent to establish Canyon de Chelly as a National Monument.[196] Tribal members give guided tours of the canyon and visitors are generally prohibited from entering the canyon without a tour guide.[197] They prohibit visitors without a guide to protect the public from potentially dangerous natural features of the land and to protect certain archaeological features within the national monument.[198]

As for Badlands National Park, the NPS is required to consult in good faith with all tribes associated with the area on any changes to the natural and cultural landscape: construction, archaeology, etc.[199] In 1968, Congress signed Public Law 90-468 into law.[200] Congress authorized the NPS to acquire lands within certain boundaries, however, if it was Oglala Sioux land, Congress required the NPS to obtain full consent of the Oglala Sioux Tribe before acquiring it.[201] In 1976, the NPS and the Oglala Sioux tribal government signed a Memorandum of Agreement concerning the South Unit of Badlands National Park.[202] This Agreement, in accordance with the authorization in Public Law 90-468, transferred tribal land to the United States in trust for the Oglala Sioux Tribe.[203] This agreement transferred land to the NPS "solely for the purpose of providing public recreation and for the development and administration by the [NPS] of administrative and public use facilities."[204] It also granted the right to the Oglala Sioux Tribe to continue using the land in the same manner as they had the right to use it before, except that they could not develop minerals on the land and only tribal members could hunt on it.[205] Further, the Tribe is given preferential rights for concession contracts and free admittance within the area.[206] Other agreements were that the NPS had to attempt to employ Tribe members for all positions within the park, Tribal members were given the right to produce and sell native handicraft objects in the park, and a fee sharing agreement for entrance fees was reached.[207] The Agreement also included restrictions on the NPS; the NPS could not develop certain areas without

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195 *Ya,at,teeh and Welcome back to Navajoland*, NPS, <https://www.nps.gov/cach/index.htm>, accessed on 10 July 2023.
196 16 U.S.C. § 445.
197 36 C.F.R. § 7.19; *Ya,at,teeh and Welcome back to Navajoland*, *supra* note 192.
198 32 Fed. Reg. 13129 (Sept. 15, 1967).
199 *Associated Tribes of Badlands National Park*, NPS, <https://www.nps.gov/badl/associated-tribes.htm>, accessed on 1 October 2023.
200 Pub. L. No. 90-468, 82 Stat. 663, (1968), <https://www.congress.gov/90/statute/STATUTE82/STATUTE-82-Pg663.pdf>, accessed on 1 October 2023.
201 *Ibid.* § 2(a).
202 *Associated Tribes of Badlands National Park*, *supra* note 198.
203 *Memorandum of Agreement Between the Oglala Sioux Tribe of South Dakota and the National Park Service of the Department of the Interior to Facilitate Establishment, Development, Administration, and Public Use of the Oglala Sioux Tribal Lands, Badlands National Monument* (1976), <https://www.nps.gov/badl/upload/1976-508.docx>, accessed on 1 October 2023.
204 *Ibid.*
205 *Ibid.* at 2–3.
206 *Ibid.* at4, 11.
207 *Ibid.* at 7–8, 17.

further tribal consent.[208] Further, the Agreement dictated that the Tribe and NPS shall meet at least twice a year to review mutual objectives and programs within the Park, including recreation, education, and wildlife control measures.[209] Finally, the Park is also bound by the Ft. Laramie Treaties of 1851 and 1868.[210]

Another example of NPS collaboration with Tribal governments is found in Death Valley National Park. The NPS and the Timbisha Shoshone Tribe work together in Death Valley.[211] This partnership arises out of the Timbisha Shoshone Homeland Act, which finally came about 67 years after the establishment of Death Valley as a protected area.[212] Congress found that "[t]he interests of both the Tribe and the National Park Service would be enhanced by recognizing their coexistence on the same land and by establishing partnerships for compatible land uses and for the interpretation of the Tribe's history and culture for visitors to the Park," and that there needed to be a "further delineation of the rights and obligations of each with respect to . . . the Park as a whole."[213] The Act's purposes included providing land within the Park to the Tribe in trust; formally recognizing the Tribe's contributions to the history, culture, and ecology of the Park; ensuring protection of the Park by cooperation and partnership between the Tribe and the NPS; ensuring that the purposes and values of the Park were not derogated; and providing opportunities to the public for richer experiences and the Tribe for economic viability.[214] Congress gave the NPS authority to establish cooperative partnerships with the Tribe to review planned development in the Park, and to develop mutually agreed upon standards for development in the Tribal areas within the Park.[215]

There have been recent strides for Native American governance and participation within federal lands and national parks. Outside of agreements formalized in the United States Code or the Code of Federal Regulations, the NPS has also been increasingly using contractual agreements with Tribes to increase their presence and participation in the parks.[216] These partnerships boost awareness for nearby Tribes and also

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[208] *Ibid*. at14.
[209] *Ibid*. at 18–20.
[210] *Associated Tribes of Badlands National Park*, *supra* note 196; *Fort Laramie Treaty of 1851 (Horse Creek Treaty)*, NPS, <https://www.nps.gov/articles/000/horse-creek-treaty.htm>, accessed on 5 August 2023 *Transcript of Treaty of Fort Laramie (1868)*, OURDOCUMENTS.GOV, <https://www.ourdocuments.gov/doc.php?flash=false&doc=42&page=transcript>, accessed on 28 October 2023.
[211] *Our Partners*, NPS, <https://www.nps.gov/deva/getinvolved/partners.htm>, accessed on 1 March 2023.
[212] *Ibid*; Timbisha Shoshone Homeland Act, Pub. L. 106-423, 114 Stat. 1875 (2000) (codified at 16 U.S.C. § 410aaa note). For more on this discussion, *see* Steven Haberfeld, 'Government-to-Government Negotiations: How the Timbisha Shoshone Got Its Land Back' (2000) 24 Am. Indian Culture and Res. J. 127.
[213] 16 U.S.C. § 410aaa note § 2(5)–(6).
[214] *Ibid*. § 3(1)–(7).
[215] *Ibid*. § 6(a)–(b).
[216] *See* Associated Press, 'Park service, tourism group partner to highlight tribes' (28 October 2021).; *see also*, NPS News Release, (7 November 2016), <https://www.nps.gov/orgs/1207/11-07-2016-

give visitors a unique perspective that they cannot obtain from non-Native sources.[217] Not only has the NPS been contracting more with Tribes, but President Biden has picked Native Americans for key government roles managing public lands. For one, President Biden nominated, and Congress appointed, Deb Haaland as the first Native American to serve as Secretary of the Interior.[218] Secretary Haaland has already started to change longstanding bad practices, including by eliminating racist place names on federal lands.[219] Further, President Biden has nominated Charles F. Sams III to head the Park Service; he is the first Native American to hold this position.[220] These appointments could be "a big-time shift of power to long-ignored tribes."[221]

Some parks are attempting to refine their strategic plans to include more Tribal recognition and governance within the parks. For example, Grand Canyon National Park, has adopted a new Grand Canyon strategic plan that would increase Tribal presence and beliefs in management decisions: "GOAL 1: Strengthen tribal relationships substantially increase collaboration, coordination, and reconciliation with associated tribes, exceeding our commitments under our government to-government relationship. Recognize tribal members' deep cultural and spiritual ties to the canyon and develop new economic, educational, and youth opportunities that can meet the needs of both the park and the associated tribes. Actions: Utilize the Native American Tourism and Improving Visitor Experience (NATIVE) Act, Grand Canyon Enlargement Act, and other authorities to partner with tribes and surrounding tribal communities to expand tourism and other economic opportunities within the park and on tribal land. Implement the Desert View Intertribal Heritage Site plan together with the park's associated tribes in a manner that ensures long term success. Develop a case study that promotes tribal partnership projects. Recognize the unique relationship that the Havasupai Tribes has with Grand Canyon National Park and work together on priority issues (e.g. protection of shared resources, Supai Camp improvements, etc.).[222]

Ultimately, whether these US examples go far enough in "validating Indigenous peoples' control over their territories and supporting their self-governance, cultures, livelihoods, and rights" is arguable.[223] Even though

native-americanheritage-month.htm>; <https://www.aianta.org/national-park-service-and-aianta-partner-to-highlight-the-history-andtraditions-of-native-communities/>, accessed on 10 July 2023.

217 *Park service, tourism group partner to highlight tribes*, *supra* note 215.

218 *U.S. Secretary of the Interior, Secretary Deb Haaland*, U.S. Dept. of the Interior, <https://www.doi.gov/secretary-deb-haaland>, accessed on 10 July 2023.

219 Jennifer Yachnin, 'Haaland strikes slur for Indigenous women from federal lands' E&E NEWS, 19 November 2021.

220 *Park service, tourism group partner to highlight tribes*, *supra* note 215;

221 Rob Hotakainen, 'Tribes flex political muscle in quest to co-manage parks' E&E NEWS, 25 February 2021.

222 Grand Canyon National Park Strategic Plan(2020 2025), <https://www.nps.gov/grca/learn/management/upload/grca-strategic-plan-single-pages-508-comp.pdf>, accessed on 10 November 2023.

223 Indigenous Peoples, *supra* note 171, at 283; *see ibid.* page 284 for a summary of the new paradigm in Indigenous peoples' rights in protecting land.

the practices in these three Parks serve as a starting point, they do not yet embody national law, policy, or standard practice throughout the US[224] Further, these arrangements tend to share some of the common failings of shared governance arrangements: inadequate scope of participation; inadequate authority given to the Tribes; unequal power relationships; recognizing Tribes as stakeholders rather than rights-holders; conflicting governance issues; and inadequate decision-making processes.[225] Indigenous, rights based involvement in protected lands has been a growing area of focus in recent years, and although there are some examples of better co-management, the world is still waiting for a country to truly embody this new paradigm.[226] "'It's beyond the point of just participation,'. . . 'Tribes need to be involved with co-management and joint management plans for national parks.'"[227]

4.3 Pre-existing Uses of Land Incompatible with Park Priorities

Sometimes the government wants to protect land that is already being used for farming, mining, logging, etc. However, many of these uses are incompatible with a national park's purpose. This section examines the government's power to regulate or ban existing uses of land when the government's goals do not match those uses.

The first thing to note about property in the United States is that the government can take it for a public use. The "takings clause" in the Fifth Amendment to the US Constitution provides this power: "nor shall private property be taken for public use, without just compensation."[228] This clause presupposes that land may be taken by the federal government, it need only satisfy several conditions: (1) there must actually be a taking, (2) the taking must be of property, (3) the taking must be for a public purpose, and (4) the owner must be paid just compensation.[229] Because the takings power is constitutional and so well decided, the government will often try to negotiate for the sale of land before "taking" it. A mutually negotiated sale can allow the landowner to try to get a better deal by participating in the negotiations. But if negotiations fail, the government always has the takings power to fall back on. This report will not discuss in detail the third or fourth element of the takings clause; taking land or property rights for a national park would almost certainly be considered a "public purpose," and "just compensation" is very technical in its calculation. Basically, "just compensation" means "market value," but there are many questions on how to appropriately calculate market value. In fact, most litigation on

[224] *Ibid.* at 287.
[225] *Ibid.* at 298–99.
[226] *Ibid.* at 291–92. *See id.* Ch. 12 for more discussion of where the new paradigm is and is heading.
[227] Hotakainen, *Tribes flex political muscle in quest to co-manage parks*, *supra* note 220.
[228] U.S. Const. Amend. 5. For procedure on what steps the federal government must take when taking property *see* 40 U.S.C. § 3111–18.
[229] Ann K. Wooster, *What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution – Supreme Court Cases*, 10 A.L.R. Fed. 2d 231, 2. Just compensation generally means "market value", however, this report will not go into greater detail on the intricacies of calculating market value.

takings centres on what an appropriate price is because it is well settled that the government has the right to take the land.

As for the second element, what is property under the takings clause? Certainly, land that is taken is property. However, an economic interest or advantage in an area (such as a legal mining interest) can also be property as used in the takings clause, but that interest or advantage must be a legally protected interest,[230] and that interest must be a recognized interest.[231] Valid contracts are also property that cannot be taken without just compensation.[232] The federal government may also take property from a state or local government for a federal public use.[233] As for what constitutes a taking, a physical appropriation is most certainly a taking.[234] Besides a transfer of ownership to the federal government, a taking can also be a deprivation of ownership, including damage to, depreciation of, or destruction of property.[235] However, what if the government just regulates an area within a certain distance of a national park and says, "Within this boundary, no landowner may mine minerals or clear-cut forests"? Generally, a regulation concerning how someone uses their land is not a taking requiring just compensation unless it is so onerous that its effect is tantamount to a direct appropriation or ouster.[236] There are only two categories of *per se* regulatory takings: (1) where the government requires a permanent physical invasion of an owner's property, and (2) where regulations deprive an owner of any economically beneficial use of the property.[237] Beyond these *per se* rules, when a property owner challenges a regulation of land as a taking, courts will look to the factors laid out in *Penn Central Transportation Co. v. City of New York* to determine whether the regulation has effected a taking.[238] These factors are (1) the regulation's economic impact on the claimant, (2) the extent to which it interferes with distinct, investment-backed expectations, and (3) the character of the government action.[239] However, outside of the *per se* rules, a court is unlikely to hold that a regulation was a taking.[240]

Curtin v. Benson gives an example of a national park regulation that would have been a taking.[241] In this case, the plaintiff brought suit to stop the park superintendent of Yosemite National Park from driving plaintiff's

[230] *Ibid.* at 4 (citing U.S. v. Willow River Power Co., 324 U.S. 499 (1945)).
[231] *Cf.* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (holding that a regulation that denies all economically beneficial use of a property does not constitute a taking if that use is not a part of the title due to the police power of the government).
[232] Wooster, *supra* note 228, at 4 (citing Lynch v. U.S., 292 U.S. 571 (1934)).
[233] *Ibid.* at 5 (citing U.S. v. Carmack, 329 U.S. 230 (1946)).
[234] *Ibid.* (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).
[235] *Ibid.* (citing U.S. v. General Motors Corporation, 323 U.S. 373 (1945)).
[236] *Ibid.* (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).
[237] *Ibid.* at 6 (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
[238] *Ibid.* at 6.
[239] *Ibid.* (citing Penn Cent. Transp. Co. v. City of New York, 428 U.S. 104 (1978).
[240] *See* other cases cited in A.L.R. section 6 for reference.
[241] Curtin v. Benson, 222 U.S. 78 (1911).

cattle from his land.[242] The plaintiff owned several hundred acres of land that were surrounded by the national park, and he owned another 23,000 acres outside of the park.[243] Roads were established between these areas prior to the establishment of the park.[244] However, Yosemite's superintendent deemed that cattle in the park were incompatible with park purposes.[245] Therefore, the park superintendent promulgated rules that would have made it impossible for the plaintiff to move his cattle from his property outside of the park to his land located within park boundaries. The Court contended that the United States may exercise the powers of a sovereign over the Park, but those powers did not amount to an ability to destroy essential, lawful use of private property.[246] An absolute prohibition on an essential, lawful use of the land would be a taking due just compensation. The Court, therefore, remanded the case as the secretary of the interior did not have the authority to promulgate rules that would in effect take land.[247]

Miller v. United States is an example of when "just compensation" is too much for the NPS, so the NPS agreed to give the land back into private ownership and to take another portion of land.[248] Because the taking split the plaintiff's land in two, and made part of it inaccessible, the "just compensation" plaintiffs filed suit for was substantially higher than if the NPS had taken the same amount of land but did not cut plaintiffs off from the rest of their land. Therefore, the Secretary of the Interior and the plaintiffs came to an agreement to restore the taken land back to the plaintiffs, and the Secretary instead would take another part of plaintiffs land for the Park.[249] By doing this, the government would only have to pay around $8 million, but if they took the original land they may have had to pay in excess of $75 million.[250] The court held that this restoration of property back to private ownership was proper, so that the land was never actually taken and the court did not have to assess the plaintiffs' "just compensation" claim.[251]

4.3.1 Uses of Land External to Parks with Negative Internal Effects

In some cases, Congress will create a national park with sufficient protected lands.[252] In others, however, outside activity may threaten a park.

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242 *Ibid.* at 82.
243 *Ibid.* at 83.
244 *Ibid.* at 82.
245 *Ibid.* at 85.
246 *Ibid.* at 85.
247 *Ibid.* at 87.
248 Miller v. United States, 209 Ct. Cl. 135 (Court of laims Reports 1976). [261] *Ibid.* at 137.
249 *Ibid.* at 138.
250 *Ibid.*
251 *Ibid.* at 138, 144. For more discussion on what just compensation means when dealing with takings for national park lands *see*, United States v. 320.0 Acres of Land, 605 F.2d 762 (5th Cir. 1979); Georgia-Pacific Corp. v. United States, 226 Ct. Cl. 95 (Court of Claims Reports, 1980).
252 *Protecting National Parks from Development Beyond Their Borders*, 132 U. PA. L. REV. 1189, 1190 (1984).

The simplest way to protect the park is through acquisition or takings.[253] Indeed, many enabling statutes for new national parks and recreation areas include language describing additional lands to be purchased in the future.[254] However, the NPS does not have enough money to buy all the land that threatens parks. But parks have other resources to protect its land, such as by bringing suit on specific external threats under federal law meant to protect from those threats, such as the Clean Air Act.

Many national parks are surrounded by Forest Service or other federally owned land. When issues arise between a national park and other federal agencies about the actions they intend to take, the NPS may not be able to buy the land and must use other means to try to resolve the conflict. Because each agency has different missions, there can sometimes be competing concerns. Private land owners may also have competing concerns with intended uses of their land. External forces on privately owned or federally managed areas, like mining, can negatively affect national park lands. Beyond buying the land, the NPS does not have much management authority beyond park borders. For example, parks should work cooperatively with others to "anticipate, avoid, and resolve potential conflicts; protect park resources and values; provide for visitor enjoyment; and address mutual interests."[255] To protect park resources from unacceptable impacts, the parks should seek to form conservation partnerships and actively participate in the planning and regulatory processes of other federal agencies.[256] Finally, park "superintendents should fully apply the principles of civic engagement to promote better understanding and communication by (1) documenting the park's concerns and sharing them with all who are interested, and (2) listening to the concerns of those who are affected by the park's actions."[257] However, the processes available to them sometimes are followed only with great restraint.[258] And they ultimately may not be very effective.

Sometimes, issues arise where another federal agency proposes an action that might have a negative effect on NPS protected lands. Agencies are required under NEPA to request comments from other agencies that may be affected by their action.[259] Ultimately, an issue is what the chances are of a negative effect and how big of an effect the action will have. For example, the Federal Aviation Administration (FAA) has the responsibility

253 *Ibid*. *Protecting* (noting Congressional action that authorized the Secretary of the Interior to acquire additional land around Redwood National Park to protect it from neighboring timber operations). Interestingly, a court noted that Redwoods National Park was violating its legal duty of protection by not buying surrounding land to protect the park. *See* Sierra Club v. Dept. of Interior, 376 F. Supp. 90, 95–96 (N.D. Cal. 1974).

254 *Ibid*. at 1190 n.10

255 Management Policies 2006, *supra* note 1, at 13.

256 *Ibid*.

257 *Ibid*. at 14.

258 Joseph L. Sax and Robert B. Keiter, 'The Realities of Regional Resource Management: Glacier National Park and its Neighbors Revisited' (2006) 33 Ecology L.Q. 233, 236.

259 40 C.F.R. § 1503.1(a)(2)(ii).

of licensing US commercial rocket launch sites.[260] Camden County wants to build a commercial spaceport and has filed for approval with the FAA.[261] In the public comment period for the permit approval, the NPS sent a letter to the FAA explaining that in the event of rocket failure, unacceptable risks may result to national seashore lands on Cumberland Island.[262] However, as the possibilities are slight, and the actions are external, "It is not clear how much weight the [NPS] objections will carry with the FAA."[263]

Another example of parks threatened by external forces is Glacier National Park.[264] In 1980, the NPS identified it as the most threatened park due to external energy exploration, timber harvesting, road construction, and private land development.[265] In an attempt to protect Glacier from external threats, the park hired a Regional Issues Specialist "to bring regional land managers together in an effort to integrate park concerns into its neighbours' priorities and agendas"; however, this effort has had little success.[266] It also revised its General Management Plan to identify external threats, but the plan still focuses mainly on internal issues.[267] There have been some developments in Forest Service land around Glacier that benefit it, however these developments are not attributable to the park.[268] On the other hand, private development around the park has become a greater issue than before, and park officials are loathe getting into this issue. Ultimately, without strong federal laws that say otherwise, strong regional cooperation in preservation is the best way for parks to protect themselves from external threats.[269]

One proposal that might better help protect parks from threats external to them is a buffer zone.[270] A buffer zone consists of regulations on land surrounding a national park subjecting them to special land use controls: no mining, deforestation, major development, etc., within a certain area around the park.[271] These regulations would allow private uses of the land, but not uses incompatible with the protected areas nearby –– the first priority is the protected area, with the interests of outside development being secondary. Mining or other activity would still be allowed outside of

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260 Associated Press, 'Decision on Ga. Spaceport permit, opposed by NPS, delayed again', E&E NEWS, 2 November 2021.
261 *Ibid.*
262 *Ibid.*
263 *Ibid.*
264 Sax & Keiter, *supra* note 257, at 235.
265 *Ibid*; *See also* America's National Park System: The Critical Documents (ed Larry M. Dilsaver, 2nd edn, 2016) 365.
266 Sax & Keiter, *supra* note 271, at 244.
267 *Ibid.*; *See also Final General Management Plan, Glacier National Park*, NPS, <https://parkplanning.nps.gov/document.cfm?parkID=61&projectID=39894&documentID=44643>, accessed on 10 July 2023 .
268 *See* Sax & Keiter, *supra* note 257, at 247.
269 *See ibid.* at 300–05. *See also* Jack McLeod, 'Helpless Giants? The National Park Service's Ability to Influence and Manage External Threats to Redwood National and State Parks' (2018) 93 Notre Dame L Rev Online 131 (concluding that the NPS has few effective tools to protect parks from external threats besides nuisance litigation).
270 Peter Dykstra, 'Defining the Mother Lode: Yellowstone National Park v. the New World Mine' (1997) 24 Ecology L.Q. 299, 301.
271 *Ibid.* at 305

the park, but only to the extent that it did not have any effect on protected land.[272] The problem with this method in America is the lack of authority that park managers have to implement this system.[273] However, Congress could designate these statutorily protected zones around national parks. Similarly, another country with regulatory power over land use could designate such buffer zones around protected areas.

4.3.2 Mining

Many laws and regulations govern mining on federal land.[274] Mining is acceptable, even encouraged by federal law, on some public lands.[275] However, mining generally goes against the purpose of a national park: to "conserve the scenery and the natural and historic objects and the wildlife therein *and* [] provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[276] Indeed, mining seems to be antithetical to this mission, especially open pit mining. Therefore, generally, a person will only be allowed to mine in a national park if they can show that they (1) hold rights to a valid mining claim, (2) have a federal mineral lease, or (3) hold non-federally owned minerals within the park.[277]

For the first category, those that show they hold a valid mining claim that existed before the creation of a park unit will be governed by 36 CFR Section 9A, among other regulations;[278] unless it is an oil or gas right, then it is governed by 36 CFR Section 9B.[279] These requirements, which may prohibit someone from exercising valid mining claims, will not constitute a taking under the Fifth Amendment if the owner of the claim did not follow the administrative requirements set forth in the regulations.[280] For the second category, the Bureau of Land Management is only allowed to lease federally owned minerals within NPS units with specific NPS consent; however, the 2006 Management Policies Section 8.7.2 closed all parks except three (Lake Mead, Whiskeytown, and Glen Canyon) to new federal mineral leasing.[281] Existing federal leases continue after the creation of the park until

[272] *Ibid.* at 306.
[273] *Ibid.* at 306–07.
[274] *See* Title 30 U.S.C.; 36 C.F.R. §§ 9A, 9B; 43 C.F.R. §§ 3100–3500; 43 C.F.R. § 36; 43 C.F.R. § 3826
[275] *See*, *e.g.*, 43 C.F.R. § 3517(a) (allowing BLM to reduce royalties charged to miners if BLM deems it necessary to promote the development of the resource).
[276] *Organic Act of 1916*, NPS, <https://www.nps.gov/grba/learn/management/organic-act-of-1916.htm>, access on 21 April 2023
[277] Management Policies 2006, *supra* note 1, at 118.
[278] *See*, *e.g.*, 36 C.F.R. §§ 1, 5, 6; 43 C.F.R. § 36. Specific parks enabling statutes may also specifically cover mining rights. *See*, *e.g.*, 16 U.S.C. § 450kk (" Donated lands may be accepted subject to such reservations, terms, and conditions as may be satisfactory to the Secretary, including . . . reservation of mineral rights subject to condition that surface of donated lands may not be used or disturbed in connection therewith, without the consent of the Secretary.").
[279] NPS, 'Director's Order #53: Special Park Uses' (US Dept. of Interior, 23 February 2010), <https://www.nps.gov/policy/DOrders/DO53.htm>, accessed on 10 July 2023.
[280] Ainzley v. United States, 98 IBLA 307, 309 (1987).
[281] *Federal Mineral Leasing (Oil, Gas, and Solid Minerals) — Legal Instruments*, NPS, <https://www.nps.gov/articles/federal-mineral-leasing-oil-gas-and-solid-minerals-legal-instruments.htm>, accessed on 10 July 2023.

the leases expire under 43 CFR Sections 3100 and 3500.[282] For the third category, those interests not governed by 36 CFR Section 9A or 9B will need a special use permit (discussed above) under 36 CFR Section 5.7 in order to protect lands and waters in the parks.[283] However, the NPS has the authority to deny the permit and acquire the land instead.[284] If NPS chooses not to acquire the land, the denial of the permit is not intended to be a taking but rather a reasonable regulation of an interest.[285] Finally, if someone has a legally valid claim and the NPS determines that development of that claim would impair park resources or values, the park will try to acquire that claim through sale or takings (discussed above).[286] For example, in 1962, Congress specifically passed an Act for Grand Canyon National Park to acquire a mining right within the park which was "adversely affect[ing] the public enjoyment of the park."[287] More recently, Congress has proposed to withdraw approximately 1,000,000 acres of federal land around Grand Canyon National Park from mining activity.[288]

4.3.3 How Does the NPS Deal With Hydropower in and Around NPS Units?

The Federal Energy Regulatory Commission (FERC) licenses all hydropower projects in the United States; NPS participates in all licensing proceedings, even if they don't affect national park resources, to protect and enhance recreation, environment, and cultural resources.[289] However, no dams, transmission lines, etc. may be built in any national park or monument without the specific authority of Congress.[290] Indeed, NPS states that dams and reservoirs will not be built in parks, and that they will seek to deactivate existing ones unless they are necessary to the park or contribute to the cultural, natural, or recreational resource base of the area.[291] Also, any applicant for a license under FERC must consult with NPS about: (1) all resources affected in NPS areas; (2) recreational resources, *even if* they do not affect any national parks; and (3) historical and archaeological values affected.[292] The NPS then makes recommendations to FERC on licensing; however, the NPS only has authority to require mandatory licensing conditions for select units of the national park system.[293]

[282] Management Policies 2006, *supra* note 1, at 118.
[283] Director's Order #53: Special Park Uses, *supra* note 278.
[284] Management Policies 2006, *supra* note 1, at 119.
[285] *Ibid.*
[286] *Ibid.* at 118.
[287] An Act to Provide for the Acquisition of a Patented Mining Claim on the South Rim of Grand Canyon National Park, Pub. L. No. 87-457, 76 Stat. 79, 79 (1962).
[288] *See* Grand Canyon Protection Act of 2021, S. 387, 117th Cong. (2021).
[289] *Hydropower and NPS*, NPS, <https://www.nps.gov/orgs/1988/hydropower-and-nps.htm>, accessed on 21 November 2023.
[290] 16 U.S.C. §§ 797a, 797c.
[291] Management Policies 2006, *supra* note 1, at 140.
[292] *Hydropower and NPS*, NPS, <https://www.nps.gov/orgs/1988/hydropower-and-nps.htm>, accessed on 21 November 2023.
[293] *Ibid.*

4.4 Public Participation and the Role of Local Communities in National Park Governance

The Administrative Procedure Act requires all agencies of the federal government, including the NPS, to make certain information public, and to solicit comments from the public on many agency decisions.[294] For one, all agency meetings on official agency business must be open for public observation except for several limited circumstances such as when the matters are "secret" (by order of the President) or are of little importance.[295] The time, place, and subject matter of these meetings must be announced and published in the Federal Register at least one week beforehand.[296] Further, an Agency generally must publish notice of all proposed rules they intend to promulgate.[297] Agencies then give interested persons an opportunity to participate in rule making through comments, submissions, and potentially oral presentations.[298] The agency must then consider these comments and incorporate them generally into the rule. Finally, each interested person has the right to petition for the issuance, amendment, or repeal of a rule.[299]

To cooperate with the Administrative Procedure Act, the NPS maintains a simple website that allows the public to easily access all NPS projects open for comment.[300] From this website, interested users can go to specific parks and see all proposed NPS actions that require public comment, and users may comment from there. These notices are also published in the Federal Register (the federal government's daily journal); however, many non-law-trained citizens are unaware of the federal register or how to navigate it. So the NPS manages its separate website to make sure its notice requirements under the Administrative Procedure Act are met.

Beyond the Administrative Procedure Act and its requirements for public participation, the NPS is also subject to other federal laws such as the National Environmental Policy Act (NEPA). Some of NEPA's goals are similar to the NPS's mission. For example, NEPA makes the federal government responsible for preserving important historic, cultural, and natural aspects of the nation and the environment.[301] Also, NEPA hopes to achieve a balance between population and resource use, similar to the NPS's competing goals of enjoyment and protection.[302] To accomplish NEPA's goals, every federal agency, including the NPS, must submit a report on the environmental impact, and any alternatives, of any proposed major federal action that will "significantly affect the quality of the human

294 *See* 5 U.S.C. §§ 551–59.
295 5 U.S.C. § 552b (a)–(c).
296 5 U.S.C. § 552b (e).
297 5 U.S.C. § 553(b). The notice requirement does not apply to interpretive rules (rules clarifying the Agency's interpretation of a rule), general statements of policy, or rules of agency organization, procedure, or practice. 5 U.S.C. § 553(b).
298 5 U.S.C. § 553(c).
299 5 U.S.C. § 553(e).
300 *See Welcome to PEPC*, NPS, <https://parkplanning.nps.gov/publicHome.cfm>, accessed on 10 July 2023.
301 42 U.S.C. § 4331(b)(4).
302 42 U.S.C. § 4331(b)(5).

environment."[303] The NEPA process does not necessitate a particular environmental result. It only prescribes the process an agency must take to evaluate –– and take a "hard look" at –– the environmental consequences of their decisions and to discuss possible mitigation measures, alternatives, consequences, and the agency's ultimate decision.[304] Further, each agency shall develop their own additional procedures under NEPA.[305]

Several points in the NEPA process allow for public participation: indeed, agencies must "make diligent efforts to involve the public in preparing and implementing their NEPA procedures."[306] If an agency conducts an environmental assessment and determines the action would not have a significant impact on the human environment, they may publish a finding of no significant impact.[307] However, actions that might have a significant impact require the agency to prepare an environmental impact statement before proceeding.[308] After a draft environmental impact statement is prepared, the agency must affirmatively solicit comments from the public (and others) "in a manner designed to inform those persons or organizations that may be interested in or affected by the proposed action."[309] The agency is bound to "consider substantive comments" by:

> (1) modifying alternatives including the proposed action;
> (2) developing and evaluating alternatives not previously given serious consideration by the agency;
> (3) supplementing, improving, or modifying its analyses;
> (4) making factual corrections; or
> (5) explaining why the comments do not warrant further agency response, recognizing that agencies are not required to respond to each comment.[310]

The agency may again request comments after the final statement is prepared but before it makes a final decision on the action.[311] The NPS's NEPA handbook prefers to use the PEPC website discussed above to solicit public comments, but parks may also use the federal register, mail or e-mail, press releases, website updates, and newsletters to keep the public informed on actions allowing public comment.[312]

Even when an agency fails to meet NEPA's requirements, courts may choose not to enjoin the project. In *Sierra Club v. Babbitt*, the NPS failed to

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303 42 U.S.C. § 4332(C).
304 *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350–52 (1989). *See also* 40 C.F.R. §§ 1500–08 for the regulations promulgated under NEPA that agencies must comply with.
305 40 C.F.R. § 1507.3. For the procedures the NPS has developed under NEPA *see NEPA Policy*, NPS, <https://www.nps.gov/subjects/nepa/policy.htm>, accessed on 21 June 2023 and related documents within webpage.
306 40 C.F.R. § 1506.6(a). *See* 40 C.F.R. § 1506.6 for further notice and hearing requirements for agencies.
307 40 C.F.R. §§ 1501.6, 1506.3(c).
308 42 U.S.C. § 4332.
309 40 C.F.R. § 1503.1(a)(1)(v).
310 40 C.F.R. § 1503.4(a)(1)–(5).
311 40 C.F.R. § 1503.1(b).
312 National Park Service, NEPA Handbook (NPS 64, 2015), <https://www.nps.gov/subjects/nepa/upload/NPS_NEPAHandbook_Final_508.pdf>, accessed on 12 July 2023.

apply NEPA early enough in its decision to rebuild a road.[313] When courts find a violation of NEPA, they "consider the balance of irreparable harm and the public interest in deciding whether to issue a permanent injunction."[314] "[I]n each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."[315] In this case, based on the balancing test, the court granted summary judgement on the parks violation of NEPA but did not require that they prepare an environmental impact statement or stop most of the work they had begun.[316] However, in other circumstances under NEPA, courts will enjoin the NPS from continuing with proposed actions.[317]

Sometimes, even with all of the reporting requirements, the NPS is not open enough with its decision-making process to properly inform the public and keep them involved. Like most agencies, there exists a lot of behind-the-scenes action that might upset the public when it comes out. For example, the NPS has reportedly been considering switching from an inefficient steam heating system to an environmentally unfriendly natural-gas-heating system.[318] The discussion NPS has been having behind the scenes has angered some of the public, who feel they should be more informed on decisions such as this.[319] Although NPS is not required to disclose these initial discussions, and there will presumably be mandated public participation if NPS does proceed in this decision, it may have been better to solicit public comments from the start.

Beyond these federal requirements, there exist other ways that the government and the NPS have encouraged active community involvement in the national parks. For one, Congress created a non-profit corporation called the National Trust for Historic Preservation in the United States.[320] The purpose of the National Trust is to facilitate public participation in the preservation of American sites, buildings, objects, and antiquities of national significance or interest.[321] The National Trust is authorized to accept gifts and bequests of money or property for the purpose described above.[322] It may then disperse these assets contractually or in cooperation with agencies for "the protection, preservation, maintenance, or operation of any historic site, building, object, or property used in connection" with public use.[323] Some of the projects the National Trust sometimes funds NPS projects. For example, in 2016, the National Trust awarded $2 million in

313 Sierra Club v. Babbitt, 69 F. Supp. 2d 1202, 1217–18 (E.D. Cal. 1999).
314 *Ibid.* at 1261. Sierra club
315 *Ibid.* (quoting Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531, 542 (1987)).
316 *See ibid.* at 1259–64.
317 *See* Sierra Club v. United States, 23 F.Supp.2d 1132 (N.D. Cal. 1998) (granting an injunction under NEPA to stop development of a lodge in Yosemite National Park).
318 *See* Rob Hotakainen, 'NPS plan to swap steam for natural gas fuels fight in Philly' E&E NEWS (3 December 2021).
319 *Ibid.*
320 *See* 54 U.S.C. § 312102.
321 54 U.S.C. § 312102(a).
322 54 U.S.C. § 312105(f)–(g).
323 *Partners in Preservation: National Parks, Nat'l Tr. for Historic Pres. (6 July 2016).*

grants to national parks to restore structures in the parks.[341] Further, many non-profit foundations have partnered with individual parks; the public can then donate to benefit specific parks.[324]

4.5 Concession Contracts to Provide Services within National Parks

For uses or services deemed appropriate in a park, which the NPS does not provide, the NPS contracts the work out to concessioners:

> "Through the use of concession contracts or commercial use authorizations, the National Park Service will provide commercial visitor services that are necessary and appropriate for public use and enjoyment. Concession operations will be consistent to the highest practicable degree with the preservation and conservation of resources and values of the park unit. Concession operations will demonstrate sound environmental management and stewardship."[325]

Indeed, the objective of concessions is to "enhance the visitor experience by allowing third parties to provide food, lodging, and recreational services to visitors, and to provide a fair return to the Federal government for allowing the provision of these services."[326] Unfortunately, due to the ever taut relationship between protection of resources and enjoyment of visitors, there can often only be one concessioner per service within a park –– without adequate oversight, these concessioners would become a monopoly with decreased quality and higher prices.[327] In 1998, Congress enacted the NPS Concessions Management Improvement Act to make concessions more competitive and business like.[328] Concessioners are now evaluated yearly on commitments made under their concessions contracts and other factors such as administrative compliance, operational performance, public health, risk management, environmental management, and asset management.[329]

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[324] *See*, *e.g.*, Yellowstone Forever, <https://www.yellowstone.org> accessed on 3 November 2023; Grand Canyon Conservancy, <https://www.grandcanyon.org> accessed on 3 November 2023.

[325] Management Policies 2006, *supra* note 1, at 144. Many of the laws and regulations affecting concessions within the park are in the National Park Service Concessions Management Improvement Act of 1998, 54 U.S.C. § 1019; 36 C.F.R. § 51; chapter 10 of the Management Policies book cited throughout this report; and NPS Director's Order #48A.

[326] Statement of Stephen P. Martin, Deputy Director, NPS, *Implementation of the National Park Service Concessions Management Improvement Act of 1998*, (6 April 2005), <https://www.doi.gov/ocl/nps-concessions-act>, accessed on 10 April 2023 (discussing some of the differences between the 1965 concessions law and the 1998 concessions law, as well as discussing current difficulties and the opportunities to overcome them).

[327] *Cf.* Statement of Stephen P. Martin, Deputy Director, NPS, *Implementation of the National Park Service Concessions Management Improvement Act of 1998*, (6 April2005), <https://www.doi.gov/ocl/nps-concessions-act>, accessed on 10 July 2023.

[328] *Ibid.* Statement of Stephen P. Martin For an in-depth discussion on the equilibrium between public lands and private enterprise, *see* Sarah E. Light, 'National Parks, Incorporated' (2020) 169 U. Pa. L. Rev. 33.

[329] Annual Overall Rating Workbook User Guide, NPS (2016), <https://www.nps.gov/subjects/concessions/upload/AOR_Workbook_User_Guide.pdf>, accessed on 10 July 2023; The standards for each of these factors are in *Standards and Evaluations*, NPS, <https://www.nps.gov/subjects/concessions/standards-andevaluations.htm>, accessed on 24 March 2023.

An important question to think about in a concession contract is who owns structures or other improvements built in parks pursuant to a concession contract? The short answer to this question, post 1998, is that title to any capital improvement built by a concessioner is vested in the United States.[330] However, the concessioner retains a leasehold surrender interest in the value of the improvement. The value of the improvement depreciates every year according to the Consumer Price Index published by the Department of Labour and the condition of the improvement.[331] Concessioners used to obtain an actual possessory interest in the improvement, but Congress changed this for new contracts from November 12, 1998.[332] Now, instead of a complicated possessory interest to litigate, concessioners have a leasehold possessory interest which entitles them only to a right of compensation for the improvement.[333] When the NPS enters into a concession contract with a new concessioner, the old concessioner is entitled to the value of their leasehold possessory interest and the new concessioner receives the leasehold surrender interest.[334]

Another important aspect for the NPS to consider are businesses located outside of parks that conduct business within parks, such as tour guides: the NPS uses Commercial Use Authorizations to regulate these businesses.[335] These authorizations are necessary when a business provides any goods, activities, services, etc. for park visitors that: (1) take place at least in part in park lands, (2) use park resources, and (3) result in monetary gain or benefit to the business.[336] These authorizations are governed by 54 USC § 101925 and are much more limited in scope than a concessionary contract; indeed, authorizations limit yearly gross receipts to $25,000 dollars.[337] Further, authorizations will be issued instead of concession contracts only when the NPS determines that the services are not necessary to the park and do not need the same provisions typical of a concession.[338] Finally, authorizations shall not be issued in a quantity that will be inconsistent with preservation and proper management of the park.[339]

5. POLICY RECOMMENDATIONS FOR CHINA'S NATIONAL PARK LEGISLATIONS

Many lessons and experiences can be learned from the US national park system in its historical development, its conservation efforts through

330 54 U.S.C. § 101915(e).
331 *Ibid.* § 101915(b)(5)–(6).
332 *Ibid.* § 101915(c).
333 *Ibid.* § 101915(b)(1). Prior to this amendment to the Code, possessory interest was more complicated to litigate and measure the value of. *See* Seven Resorts, Inc. v. United States, 112 Fed. Cl. 745 (Fed. Cl. 2013).
334 *Ibid.* § 101915(d).
335 *Ibid.* Statement of Stephen P. Martin
336 *Providing Visitor Services through CUAs*, NPS, <https://www.nps.gov/subjects/cua/index.htm>, accessed on 8 March 2023.
337 54 U.S.C. § 101925; Management Policies 2006, *supra* note1, at 150.
338 Management Policies 2006, *supra* note1, at 150.
339 Management Policies 2006, *supra* note1, at 150.

rule of law and how it addressed the challenges facing in the current times that described in details above. Specifically, in respond to Chinese partners' concerns in China's pending National Park Legislations, we would like to make the following three policy recommendations:

5.1 Establishing Clear Legal Authorities

As mentioned above, designation of a national park in the United States requires an act of Congress. Should China adopt a single comprehensive law for all national parks, or should China adopt a separate law for each national park? There is no "correct" answer to this "One Park One Law" question. It very much depends on what is likely to work most effectively in China. Three potential management systems for national parks in China: (1) managed by central government, (2) managed by provincial government, (3) managed by both. The advantages of a national park system directly managed by central government include centralized, controlled, accountable and consistent. The advantages of a national park system mainly managed by provincial government will be local benefits and support, sensitive to local needs and concerns. However, no matter which governance model Chinese legislators chose, based on the American experiences, it is critical to establish clear legal authorities for the national parks' managers and other stakeholders to follow.

As explained in details in this report, the management of the National Park System and NPS programs is guided by the US Constitution, public laws, treaties, executive orders, regulations, and directives of the Department of the Interior. Once laws are enacted, authority for interpreting and implementing them is delegated to appropriate levels of government. The 2006 volume of NPS Management Policies document that this report cited many time is arguably the most important for governing what can and can't happen in national parks. The following principles of NPS Management Policies can also be good example for China's national park system policies:

1) comply with current laws, regulations, and executive orders;
2) prevent impairment of park resources and values;
3) ensure that conservation will be predominant when there is a conflict between the protection of resources and their use;
4) maintain NPS responsibility for making decisions and for exercising key authorities;
5) emphasize consultation and cooperation with local/state/tribal/federal entities;
6) support pursuit of the best contemporary business practices and sustainability;
7) encourage consistency across the system—"one National Park System";
8) reflect NPS goals and a commitment to cooperative conservation and civic engagement;
9) employ a tone that leaves no room for misunderstanding the Park Service's commitment to the public's appropriate use and

enjoyment, including education and interpretation, of park resources, while preventing unacceptable impacts;

10) pass on to future generations natural, cultural, and physical resources that meet desired conditions better than they do today, along with improved opportunities for enjoyment.[340]

5.2 Promoting Public Participation

The National Park System in the US recognized the important role the general public and civil society organizations can play in the NP governance. Various legal authorities have built in public participation mechanisms in the national parks governance. National Parks' managers and staff members are required by the National Environmental Policy Act and other federal laws to make a diligent effort to involve the public in decisions and actions of the NP planning and managements.[341] The NP managers in the United States value the public input in their decision makings and proactively built relationship with the public, publish national parks' proposed decisions and actions to the public and solicit comments from the public. NPS established Planning, Environment, and Public Comment (PEPC) in 2005 to provide access to detailed information and accept public comments on current projects in addition to issue press release, publish notice or convene public meetings.

In addition to participate in the planning and management decisions, public is encouraged to participate in the national parks operations. National Park System established and maintained closed to nine hundreds of tourist centres and contact points, developed special events and ranger education programs and operated "junior ranger education program" tailors to children. NPS develop volunteer service system to engage public in contributing pro bono services to protect the nature. Many national parks also have friends of parks fund raising mechanism to encourage public to donate money to support parks' conservation efforts.

Finally, US law empowers the public to file public interest litigation to seek judicial review of national park management decisions if they disagreed with the final decisions even after the public participation phrase. For example, in the Greater Yellowstone Coalition v. Babbitt, 952 F.Supp. 1435 (1996) case, conservation groups sought to enjoin implementation of the Interim Bison Management Plan in Yellowstone National Park to challenge the park's decision on the bison management.[342]

Based on these successful experiences, it is critical for Chinese National Park's legislation to develop a comprehensive and diversified public participation system to support national park system development.

[340] Management Policies 2006, *supra* note 1, at 5.
[341] Director's Order No. 75A
[342] Greater Yellowstone Coalition v. Babbitt, 952 F.Supp. 1435 (1996)

5.3 Respecting Traditional Cultures of Indigenous Communities and Building

The historical development of national park system in the US also shows us the critical needs of respecting the Indigenous communities and build harmonized relationship between the national parks and local communities. As we know, the pilot national parks also contain towns and villages where Indigenous communities continue to live and build their livelihood. For example, in the Sanjiangyuan National Park Pilot, which contains the headwaters for the Yangtze River, Yellow River and Lancang (Mekong) River, Tibetan communities continue their pastoral lifestyles that reflect centuries of living in relative harmony with the landscape. It is crucial to address how the management of the national park would support the local people, especially in the smaller towns and villages, to ensure that their needs are respected and met to the extent feasible, while placing ecological protection as a top priority in developing the national park system.

As we mentioned above, some parks in the US are in the process to refine their strategic plans to include more Tribal recognition and governance within the parks, including Grand Canyon National Park, which has proposed an outline for a new Grand Canyon strategic plan that would increase Tribal presence and beliefs in management decisions. In addition, in the report issued by the National Parks Second Century Commission, an independent commission in September 2009, the commission cites the importance or working with surrounding local communities in collaborative stewardship.[343] These are the two key areas that China and the US national park systems can learn from each other and work towards more innovative solutions and new progress in the future legislation efforts.

6. CONCLUSION

America's best idea may now be China's, too, as it expands national park system", as the reporter at the Los Angeles Time, Jessica Meyers first reported Chinese government's plan to develop Chinese national park system observed, many collaboration efforts were invested between these two countries to realize this goal.[344] For example, the Paulson Institute, led by Mr. Henry M. Paulson Jr., the former United States Treasury secretary has initiated joint program with China's National Development and Reform Commission to support the construction of China's national park system and facilitated many exchanges between US national park system and China's counterparts. The United States and China has developed seven

[343] National Parks Second Century Commission, Advancing the National Park Idea (2009).

[344] Jessica Meyers, 'America's best idea may now be China's, too, as it expands national park system' The Los Angeles Times (5 October 2016), <https://www.latimes.com/world/asia/la-fg-china-national-parks-snap-story.html>, accessed on 10 July 2023.

sister parks (protected areas) relationships.[345] Dr. Su Yang, research fellow at the Development Research Centre of the State Council said that "the US has done a really great job with environmental protection education that we would like to learn".[346] We sincerely hope that the findings shared in this research report will deepen this movement of exchanges and learning processes. We also strongly believe that with the new development of China's national park system legislation and governance, the US National Park Service will also mutually benefit from the exchanges that the US National Park Service will be enhanced more vibrant and wondrous for future generations and the world.

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[346] *See* supra note 343.

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Conceived and designed the research or analysis	Yes	Yes
Collected the data	Yes	Yes
Contributed to data analysis & interpretation	Yes	Yes
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The author(s) solemnly declare(s) that this research has not involved any human subject (body or organs) for experimentation. It was not a clinical research. The contexts of human population/participation were only indirectly covered through literature review. Therefore, an Ethical Clearance (from a Committee or Authority) or ethical obligation of Helsinki Declaration does not apply in cases of this study or written work.

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